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ABSTRACT

The framework for dealing with the educational rights of handicapped students has been established in the Education for All Handicapped Children Act, generally known as Public Law 94-142, and the Rehabilitation Act of 1973, generally referred to as Section 504. The ramifications for implementing these laws are complex and generally result in plowing new legal ground. The manner in which the federal statutes interrelate to state statutes has been discussed but there is little agreement as to what conclusions may be drawn. The six presentations included in this publication provide one of the first detailed reviews in the area of education of the handicapped. The titles and authors of the papers are: "An Overview of Due Process Considerations Under Section 504 and Public Law 94-142" by Michael J. Julka: "Public Law 94-142: Identification and Evaluation" by Carmela M. Bowns: "Tests and the Placement of Handicapped Students" by Thomas M. Griffin: "Educational Placement of the Handicapped--Selected Issues" by Michael I. Levin: "Disciplining the Handicapped Student" by Patricia W. Morrison: and "Liability for Wrongful Identification, Evaluation or Placement--Is There Malpractice?" by Edward W. Remsburg. (Author/MLF)

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Schools and the Law of the Handicapped

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CHAIRMAN'S NOTE

A symposium of the National Council of School Attorneys was held on Friday, April 18, 1980, in San Francisco, California, as part of the Council's annual meeting. This publication is the result of papers presented at the symposium on Educational Law Issues Related to Education of the Handicapped.

The framework for dealing with the educational rights of handicapped students has been established in Public Law 94-142 and Section 504. The ramifications for implementing these laws are complex and generally result in plowing new legal ground. The manner in which the federal interrelates to state statutes has been discussed but there is little agreement as to what conclusions may be drawn. The six presentations included in this publication provide one of the first detailed reviews in the area of education of the handicapped.

I appreciate the time and thorough preparation put into each paper included in this publication. The changing and varying directions which educators and courts have taken with regard to the requirements for education of the handicapped made it difficult to prepare each presentation. In addition, the editorial assistance of Sandra L. Githens is acknowledged.

The Coucil of School Attorneys, the six persons whose presentations made up this publication, and the staff of NSBA hope this publication will offer some enlightenment on the education of the handicapped.

Sincerely,

Edgar H. Bittle
Chairman
NSBA Council of School Attorneys

TABLE OF CONTENTS

	Page
AN OVERVIEW OF DUE PROCESS CONSIDERATIONS UNDER SECTION 504 AND PUBLIC LAW 94-142 Michael J. Julka	1
PUBLIC LAW 94-142: IDENTIFICATION AND EVALUATION Carmela M. Bowns	24
TESTS AND THE PLACEMENT OF HANDICAPPED STUDENTS Thomas M. Griffin	42
EDUCATIONAL PLACEMENT OF THE HANDICAPPED - SELECTED ISSUES Michael I. Levin	50
DISCIPLINING THE HANDICAPPED STUDENT Patricia W. Morrison	76
LIABILITY FOR WRONGFUL IDENTIFICATION, EVALUATION OR PLACEMENT - IS THERE MALPRACTICE? Edward W. Remsburg	86

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AN OVERVIEW OF DUE PROCESS CONSIDERATIONS UNDER SECTION 504 AND PUBLIC LAW 94-142

By: MICHAEL J. JULKA
Madison, Wisconsin

Attorneys who have been called upon by school district personnel for counsel concerning the education of the handicapped are well aware that sec. 504 of the Rehabilitation Act of 1973,[1] the Education for all Handicapped Children Act of 1975 (P.L. 94-142),[2] and their implementing regulations[3] contain substantial due process safeguards. Congress regarded these safeguards as mandated by the United States Constitution and necessary to protect handicapped children against the possibilities of discriminatory treatment, abusive classification, and inappropriate educational services.[4]

Our lawmakers in Washington, D.C., were guided in their efforts to develop this legislation by two landmark federal district court cases arising in the early 1970's which, as a matter of constitutional law, laid the foundation for procedural due process protection for handicapped children.[5] Therefore, before discussing the due process considerations under sec. 504 and P.L. 94-142, a short review of these cases is in order.

CONSTITUTIONAL FOUNDATIONS

The fifth and fourteenth amendments to the United States Constitution prohibit federal and state governments from depriving any person of liberty or property without due process of law. It is this basic tenet of individual rights, along with the Equal Protection Clause, upon which the plaintiffs in Pennsylvania Association of Retarded Children v. Pennsylvania (PARC)[6] and Mills v. Board of Education[7] based their respective actions in their attempts to secure equal educational opportunities for handicapped children approximately a decade ago.

PARC was brought in 1971 as a class action. The plaintiff class consisted of all retarded children under the age of twenty-one whom the state had excluded from school pursuant to state statutes which allowed the exclusion of all children found to be "uneducable." In addition to an equal protection claim, the plaintiffs alleged a denial of due process of law resulting from the "stigma" attached to children labeled "mentally retarded" and excluded from school. Under Pennsylvania statute, this exclusion could be carried out by school district employees without notice to, or an opportunity to be heard from, the parents of the handicapped child.

Relying on the United States Supreme Court decision in Wisconsin v. Constantineau,[8] the federal district court sustained a consent agreement entered into by the parties. That agreement granted handicapped children and their parents the right to prior notice and an opportunity for a full adversary hearing before any change in, or refusal to change, a child's educational classification.

The liberty interests of handicapped children to an education were also recognized in Mills. In granting summary judgment for the plaintiffs (seven children excluded from public schools in the District of Columbia), a federal district court held that prior to a child being assigned, suspended, or expelled from regular or specialized instruction, due process of law required that notice, hearing rights, and periodic review be provided.

However, the court's Judgment and Decree[9] is very specific in detailing the necessary procedural due process requirements which the school district is compelled to follow in dealing with its handicapped children. According to the court, any child that the school district or parent thinks is in need of special education may not be placed in, transferred from or to, or denied placement in such program unless, prior to taking such action, the school district provides the parent or guardian of the child notice by registered mail of:

(1) The proposed action in detail, the reasons therefore (including the specification of any test or reports on which such action was based), and any alternative educational opportunities available to the student;

(2) The parents' right to a hearing before an independent hearing officer if objection is made to the proposed action;

(3) The parents' right to obtain free of charge an independent medical, psychological, and educational evaluation of the child;

(4) The parents' right to be represented at the hearing by counsel and to present evidence on the child's behalf; and

(5) The parents' right to cross examine witnesses and to have access to all official school records pertaining to the child before the hearing takes place.

The court also determined that the school district must schedule the hearing at a time and place reasonably convenient to the parent, but in no event sooner than twenty days or later than forty-five days after receiving the parents' request for the hearing. Further, at the hearing, the school district carries the burden of proof as to all facts and as to the appropriateness of the placement, denial of placement, or transfer.

The court further provided that the independent hearing officer may not be an employee or agent of the school district, and that the hearing officer must render a decision in writing within thirty days after the hearing. Pending a determination by the hearing examiner, the school district may take no action regarding the child if the child's parents object. A tape recording or other record of the hearing is to be made available to the parent upon request. Finally, the parents may appeal the hearing officer's decision.

PARC and Mills represent two courts' interpretations of the due process safeguards constitutionally mandated for the benefit of handicapped students and their parents. However, it will become apparent when we discuss the procedural concepts embodied in sec. 504, P.L. 94-142, and their implementing regulations, that Congress and its enforcing agencies relied extensively upon the PARC and Mills decisions in formulating the present complement of statutory and regulatory protections.

CONGRESSIONAL RESPONSE

Shortly after the PARC and Mills decisions and the public debate they generated, Congress responded in late 1972 with the first civil rights legislation for handicapped individuals by enacting sec. 504.[10] As a result, school district programs or activities receiving federal financial assistance were prohibited from discriminating against any individual, including students, on the basis of a handicap. However, sec. 504 is silent as to what, if any, due process procedures are required prior to a decision by school district personnel concerning educating handicapped students.

By 1975 many states and local educational agencies were having difficulty meeting the needs of handicapped students due primarily to the increased cost of providing their education. Congress responded by enacting P.L. 94-142 which provides for federal funding of the excess cost of educating the handicapped.[11] In order to obtain financial assistance, a strict set of conditions must be met. One of the "eligibility requirements" under P.L. 94-142 requires the state receiving the funds to establish a plan which incorporates and conforms to the extensive procedural safeguards which Congress expressly provided in P.L. 94-142.[12] New Mexico is the only state which has elected not to receive such funding.

Subsequently, the implementing regulations for sec. 504 were promulgated. They provided in part:

> "A recipient that operates a public elementary or secondary educational program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational place-

> ments of persons who, because of handicap, need or are believed to need special education or related services, a system of procedural safeguards that include notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure."[13]

In addition, the sec. 504 regulations provide that complying with the procedural safeguards embodied in P.L. 94-142 is one means of meeting the procedural due process requirements under sec. 504. Accordingly, the Office of Civil Rights (OCR), the sec. 504 enforcement agency, has taken the position that it will coordinate the procedural due process safeguards under sec. 504 with those embodied in P.L. 94-142.[14] However, while the general purposes and due process procedural requirements under each statute may generally be the same, their scope of coverage differs.[15]

PROCEDURAL PROTECTIONS

The preponderance of due process considerations arising under sec. 504 and P.L. 94-142 involve one or more of the following basic concepts: (1) notice, (2) consent, (3) hearings, and (4) appeals.

(1) Notice

Public Law 94-142 and its implementing regulations require prior written notice to the parents or guardian of a handicapped child whenever a school district[16] proposes or refuses to initiate or change the child's identification, evaluation, educational placement, or the provision of a free appropriate public education to the child.[17]

The notice must contain (1) a full explanation of all the procedural safeguards provided in the law, (2) a description of the action proposed or refused and why the district proposes or refuses to take such action, (3) a description of the options considered by the district and why they were rejected, (4) a description of each evaluation procedure, test, record or report used as a basis for the proposed or refused action, and (5) any other relevant factors.[18]

Also, the notice must be transmitted in the native language of the parent, and the school district must take steps to ensure that the parent understands the contents of the notice.[19] Written evidence of compliance with these requirements must be kept on file by the school district.[20]

In spite of these extensive notice requirements, the Bureau of Education for the Handicapped (BEH), the P.L. 94-142 enforcement agency, has proposed that in certain situations even more information be contained in the notice to parents. Whenever a school district proposes to initiate an evaluation, or proposes or refuses to initiate or change the educational placement of a child, BEH would, in addition to the requirements set forth above, require that districts not rely on generic (e.g., intelligence measurement, achievement testing, etc.) categories alone when describing what tests the child will undergo or has already undergone. Instead, the use of generic categorizations would be acceptable only if accompanied by a general description of each category, including references to examples of individual tests, records, or procedures that will be or have been used in the evaluation process.[21]

Several cases have addressed the importance of providing prior written notice to a handicapped child's parents whenever required by the federal statutes. One of the earliest was Hairston v. Drosick[22] wherein a federal district court held that a school district's exclusion of a spina bifida child without prior written notice to the parents and an opportunity for them to be heard violated sec. 504 and the fourteenth amendment to the United States Constitution.

School districts seeking to avoid being held accountable for failing to give the required prior written notice must determine when such notices need to be given. As pointed out above, prior written notice must be given whenever the district proposes to or refuses to initiate or change a handicapped child's identification, evaluation, educational placement, or the provision of a free appropriate public education to the child. Unfortunately, the terms "identification" and "educational placement" are not defined by statute or the regulations.

The term "identification" probably refers to a situation in which a school district seeks to identify children with handicapping conditions pursuant to its evaluation procedure. On the other hand, substantial litigation has occurred regarding the parameters of the term "educational placement." Examples of some of the more interesting decisions where a change in educational placement was held to have taken place and notice required include: (1) transferring children from one school district to another district to attend a relocated special education program;[23] (2) not placing a handicapped child in the school closest to the parents' residence;[24] (3) the expulsion or exclusion of identified or suspected handicapped children;[25] and (4) the retention of handicapped students in their present grade for another school year.[26]

Some guidance as to the meaning of the terms "evaluation" and "free appropriate public education" is provided by the regulations. "Evaluation" is defined to mean those procedures used to determine whether a child is handicapped and the nature and extent to which the child needs special education and related services.[27] In other words,

the term means procedures used selectively with an individual child, but does not include basic tests or other evaluations administered to all children in a school, grade, or class.

"Free appropriate public education" refers to a special education and related services which a school district provides at public expense in accordance with the requirements of state and federal education of the handicapped laws.[28]

(2) Consent

The securing of parental consent prior to conducting preplacement evaluation of any student or initial placement of an identified handicapped student is an integral safeguard mandated by the regulations promulgated under P.L. 94-142.[29] Interestingly, the statute does not require such parental consent. However, the regulations are specific as to the applicability of the consent requirements. Therefore, changes in a child's special education program after the initial placement are not subject to parental consent, but are subject to the prior written notice requirement.[30]

The concept of mass consent recently received the approval of BEH.[31] A school district in Georgia, which was experiencing major delays in receiving written permission after children were referred for evaluation and assessment during the school year, sought permission to obtain, on a voluntary basis, written permission from parents at the time of student registration. In upholding this procedure, BEH stressed that the parents must be fully informed of all of their rights under P.L. 94-142 before consent is given. In addition, BEH pointed out that, in any event, prior to any preplacement evaluation actually taking place, the parent is entitled to prior written notice of the proposed evaluation allowing the parent to revoke any earlier consent which may have been given.

Another procedural consideration for school districts is the question of what to do when a parent refuses to give the consent necessary to allow the district to conduct a preplacement evaluation of a student, or an initial placement of an identified handcapped child. Some guidance is found in P.L. 94-142's regulations which provide that if state law also requires parental consent before a handicapped child is evaluated or initially provided special education and related services, state procedures govern the overriding of a parent's refusal to consent. Where there is no state law requiring consent, a school district may use the due process hearing procedures discussed below to determine if the child may be evaluated or initially provided special education services without parental consent.[32] If the hearing officer sustains the school district's decision regard-

ing evaluation or initial placement of the child, the child may be evaluated or placed without the parents' consent, subject to the parents' right to appeal the decision.[33]

On the other hand, the regulations are silent as to the procedures to follow in a situation like that existing in Wisconsin where state law provides that parental consent must be obtained prior to the preplacement evaluation of a student, or initial placement of a handicapped child. Therefore, under the above mentioned regulation, school districts are required to look to state remedies to override a denial of parental consent. However, the state statutes and administrative regulations governing education of the handicapped do not address the procedures to be utilized to override a parent's refusal to consent. While it is possible that a school district may seek a court order appointing a guardian for the child empowered to provide the necessary consent, such an order may be difficult to obtain.

The frustration that the lack of parental consent may create in a school district is evident in a case involving the Palmyra-Eagle School District in Wisconsin.[34] In that case, a 10th grade student was suspected of having exceptional educational needs based on his disruptive and disobedient conduct. However, the parents of the child repeatedly refused to give the school district permission to evaluate the student, despite the school district's efforts to convince the parents of the need of such evaluation. Subsequently, the board of education expelled the student pursuant to a state statute, and the student appealed to the Superintendent of Public Instruction.

The Superintendent, finding that one of the reasons for which the student was expelled was his parents' refusal to consent to an evaluation of his suspected exceptional educational needs, reversed the expulsion as inappropriate and unlawful. Without enumeration, the Superintendent stated that the school board had other legal options available to deal with denial of parental consent. On appeal to a county circuit court, the Superintendent's decision was sustained.[35]

A recent BEH interpretation provides further guidance to school districts in such situations. According to BEH, when state law requires parental consent but does not provide procedures for overriding denial of consent, a school district may use the due process hearing procudures discussed below to attempt to override the denial.[36]

(3) Opportunity to be Heard

(a) Meetings

To meet the individual needs of each identified handicapped student, a school district must develop and implement an individualized

educational program (IEP).[37] An IEP must be developed, reviewed, or revised at "meetings" conducted by the school district.[38] The school district must ensure that the following persons are present at such a meeting: (1) a representative of the school district, other than the child's teacher, who is qualified to provide or supervise the provision of special education to the student; (2) the child's teacher; (3) one or both of the child's parents; (4) the child, where appropriate; and (5) other individuals at the discretion of the parent or district.[39]

In addition, where a handicapped child is being evaluated for the first time, the school district must also ensure that a member of the evaluation team participates in the meeting.[40] If this is not possible, some other representative of the district who is knowledgable about the evaluation procedures used with a child and is familiar with the results of the evaluation must be present.[41]

A meeting must be held for any student suspected of needing special education or related services within 30 days of this determination.[42] Once an appropriate IEP has been developed, the school district must review the IEP whenever appropriate, but in no event less than once a year.[43]

Parent presence and participation are two of the most important aspects of a meeting. Accordingly, a school district is required to take exceptional steps to ensure that the child's parents are notified and understand the importance of the upcoming proceeding. For example, the steps that a school district may have to take to ensure that one or both of the parents of a handicapped child are present at each meeting and are afforded the opportunity to participate include: (1) notifying the parent of the meeting and scheduling the meeting at a time and place agreeable to the parents; and (2) indicating to the parents the purpose, time, and location of the meeting and who will be in attendance.[44]

In the event that neither parent is able to attend but would like to participate in the meeting, the school district is required to use other methods to ensure their participation, including individual or conference telephone calls.[45]

A meeting may be conducted without a parent in attendance only if the school district is unable to convince the parents that they should attend. Furthermore, the school district must have a record of its attempts to arrange a mutually agreed upon time and place, including detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any response received, and detailed records of visits made to the parents' home or place of employment and the results of those visits.[46]

Finally, if the parents choose to attend the meeting, the school district must take whatever action is necessary to ensure that they understand the proceeding, including providing an interpreter for parents who are deaf or whose native language is other than English.[47]

While the procedures for conducting the meeting appear to be left to the discretion of the school district, many school districts are surprised when a child's parents are represented at the meeting by an attorney or other child/parent advocate. Representation of the child/parent often turns the meeting into an adversarial setting and hinders development of the IEP. In some instances, however, a child/parent representative merely observes and records the proceeding in order to establish a foundation to overturn an unsatisfactory placement at an appeal hearing.

(b) Hearings

After being informed by written notice of a school district's proposal or refusal to initiate or change any aspect of a child's identification, evaluation, educational placement, or provision of a free appropriate public education, the child's parents must be given the opportunity to complain to the district. If the parents file a complaint, they are entitled to an impartial due process hearing.[48]

In addition, the child involved must remain in his or her present educational placement throughout all administrative or judicial proceedings, unless the parents and school district agree otherwise.[49] However, where the child's initial admission to public school is in question, the child, with the consent of the parents, must be placed in the public school program until the completion of all proceedings.[50] This inability to change a child's placement during a complaint proceeding does not preclude a school district from using its "normal procedures" for dealing with children who are endangering themselves or others.[51]

After receiving a complaint, a school district may not reject the complaint and refuse to hold a hearing if the complaint results from a disagreement with the parents and concerns any matter regarding the child's identification, evaluation, educational placement, or the provision of a free appropriate public education.[52] In fact, even if a school district has received an opinion from BEH concerning the very subject upon which a hearing is requested by a parent, the district may not rely on that opinion to override or deny a properly made request for a due process hearing.[53]

The hearing must be conducted by the school district directly responsible for the education of the child at its expense.[54] An impartial hearing officer must be selected to receive evidence and render a decision. Public Law 94-142's regulations provide that the hearing may not be conducted by a person who is an employee of the school district involved in the education or care of the child, or by

any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.[55]

Similarly, in Policy Interpretation No. 6,[56] OCR ruled that sec. 540 prohibits school board members from serving as hearing officers in proceedings conducted to resolve disputes between parents of handicapped children and their own school district. Not only did OCR believe that school board members would have an improper financial interest in the outcome of the hearing since an adverse decision to the parents might avoid additional expenditures by the school board, OCR also opined that its commitment to coordinate the sec. 504 procedural safeguards with those established by BEH under P.L. 94-142 requires this interpretation.

On the other hand, both OCR and BEH have determined that state educational agency employees, including a State Superintendent or Commissioner of Education, may serve as impartial hearing officers provided: (1) the state agency is not directly responsible for supplying the special education or related services to the handicapped child in question; and (2) the state hearing officer makes a case by case determination to ensure his/her overall impartiality.[57] Nevertheless, at least one federal district court has held that state agency employees may never serve as hearing officers.[58]

A troublesome result of interpreting sec. 504 and P.L. 94-142 to prohibit school board members from acting as hearing officers is the resulting conflict with some state laws. For example, Missouri statutes allow the school board to render the final due process hearing decision, thereby treating a hearing examiner's decision as only a recommendation to the board of education. Based on the regulations promulgated under sec. 504, and in accordance with Policy Interpretation No. 6, OCR ruled that such a procedure is illegal. Therefore, OCR ordered the school board to treat the hearing examiner's decision as final, unless a proper appeal by the parent or school district was undertaken.[59]

Similarly, state laws in Kansas, Georgia, and Wisconsin, inter alia, provide that if the parents of a handicapped child are dissatisfied with the decision rendered by a hearing officer, they may appeal to the local board of education. Despite the fact that in each state a local school board's decision may be appealed under state law to the state educational agency, OCR has determined that this procedure violates sec. 504's regulations and Policy Interpretation No. 6, while BEH has ruled that a board of education's only powers in such instances are to decide to implement the hearing decision or appeal the decision.[60] Finally, at least one state supreme court has held that the federal regulations override conflicting state provisions.[61]

When a due process hearing is necessary, it must be held at a time and place mutually agreeable to all the parties. At the hearing, all parties have the right to be accompanied and advised by counsel, or by individuals with special knowledge or training regarding handicapped children.[62] Moreover, school boards should be aware that whenever they or the parent initiate a due process hearing, they must provide the parent with information of any free or low cost legal or other relevant services which may be available.[63]

Any party to a hearing has the right to present evidence and confront, cross examine, and compel the attendance of witnesses.[64] The hearing examiner is to hear all the relevant evidence which any party wishes to present.[65] Parties may utilize any method which is established as acceptable practice in the state in which the hearing is initiated, including subpoenas, to compel the attendance of witnesses, and it is left to state statutes to determine whether witnesses must be under oath while testifying.[66]

To eliminate surprises at the hearing, P.L. 94-142 contains its own "discovery" procedures. First, any party may prohibit the introduction of evidence at the hearing which was not disclosed to that party at least five days before the hearing.[67] Second, the parents of a handicapped child must be given an opportunity to examine all relevant records concerning the child's identification, evaluation, educational placement or access to a free appropriate public education.[68] Third, the parents of a handicapped child must be given the opportunity to obtain an independent evaluation of the child at public expense.[69]

The prohibition against introducing any evidence at the hearing which was not disclosed to a party at least five days before the hearing has been tempered by a recent BEH interpretation.[70] BEH opined that it is not necessary to reveal all the evidence that will be used by either party. However, the opinion does not provide sufficient guidance to determine the parameters of what must be disclosed, except that the names of witnesses to be called and a general thrust of their testimony must be made available.

Parents also have the right to have their child present and to have the hearing open or closed to the public.[71] As regards the latter right, the New York Commissioner of Education determined that a due process violation did not occur when, following a parental request for a closed hearing, the president of the school board was allowed to attend.[72] The record was unclear as to the capacity in which the board president was attending the hearing. However, the Commissioner stated that if the board president attended as a board representative, no violation of the right to a closed hearing occurred. Similarly, if

the board president attended in his personal capacity, any violation that occurred did not affect the appropriateness of the recommended placement and did not justify any relief for the parents. This is one of several recent decisions which suggest that a "harmless error" doctrine may be applied in appropriate circumstances.[73]

Following the hearing, a written or electronic record of the proceedings must be provided to each party upon request.[74] Also, a copy of the hearing examiner's written findings of fact and decision must be mailed to each party within 45 days after the request for the hearing is received.[75]

Two very important, and somewhat controversial, considerations for counsel preparing to represent a school district in a due process hearing are: (1) who carries the burden of proof, and (2) what substantive standard of proof is required.

In a recent Wisconsin decision,[76] the Superintendent of Public Instruction concluded that a hearing examiner must accord a school district's evaluation and placement a presumption of appropriateness. This presumption may be rebutted by the parents upon proof by a clear preponderance of the evidence that the educational placement recommended by the school district is not appropriate. As stated by the Superintendent:

> "To suggest that the school district's evaluation and placement decision are not entitled to such a presumption of correctness is to imply that the professional evaluations conducted under the elaborate requirements of the law are presumptively incorrect. There is nothing in the state or federal law that compels such an illogical conclusion. Considering the expertise of the persons required to conduct the evaluations and make placement decisions, the risk of error appears to be slight and is adequately safeguarded by the opportunity to challenge those conclusions at the hearing."

The Wisconsin Superintendent of Public Instruction's decision is in general accord with the result reached by a federal district court in Stemple v. Board of Education of Prince George's County.[77] In that case, the student challenged the hearing examiner's decision that she carried the burden of persuasion throughout the due process hearing proceedings. In affirming the hearing examiner, the court held that sec. 504 does not require that school authorities have the burden of proof. In view of all of the other extensive due process procedures afforded the plaintiffs at the hearing, the court concluded that allocating the burden of proof to the parents did not deny them the due process guarantee of a "meaningful opportunity to be heard."

The above authorities' conclusions regarding the burden of proof are contrary to that set forth in Mills. As mentioned above, the court in Mills held that a school district is required as a matter of constitutional due process to carry the burden of proof to sustain the district's evaluation and placement decisions.

Finally, considering the extensive due process hearing procedures that must be afforded to handicapped children and their parents in all matters relating to the handicapped child's identification, evaluation, educational placement, or provision of a free appropriate public education, school boards may wish to consider utilizing mediation as an intervening step prior to conducting formal due process hearings. While not required by sec. 504, P.L. 94-142, or their regulations, school boards may discover mediation resolves differences between parents and the board without creating an adversarial relationship.[78] Of course, school boards are advised not to require mediation or use it to deny or delay a parent's guaranteed due process hearing rights.[79]

(4) Appeals

(a) State Educational Agency Review

Under federal law, the decision of a hearing examiner is final unless a party to the hearing appeals the decision to the state educational agency (SEA).[80] In such cases, the SEA shall conduct an impartial review of the hearing and render an independent decision within 30 days after the request for review is received.[81] The reviewing officer is directed to examine the entire hearing record to ensure that the procedures used in noticing and conducting the hearing were consistent with all due process requirements.[82]

The reviewing officer may provide all parties the opportunity for oral or written argument and/or may seek additional evidence by conducting another due process hearing.[83] The decision whether to hear additional evidence is within the discretion of the reviewing officer. In each instance, the reviewing officer must make a threshhold determination as to whether additional evidence is necessary. If no need exists, a parent will not be deemed deprived of any rights if denied an opportunity to present new or additional evidence at an appeal hearing.[84]

Counsel representing school districts in SEA appeals must again be concerned with the appropriate review standard which will be utilized by the SEA. Unfortunately, no generally accepted standard of review exists. To date, the "preponderance of evidence test,"[85] "any evidence test,"[86] and "competent, material, and substantive evidence test,"[87] have been utilized by SEA's. Accordingly, district counsel should check state law for provisions governing the review standard.

(b) Court Review

The findings and decision of the reviewing officer are final unless a party to the review proceedings brings a civil action in state court or federal district court.[88] In such instances, the district court is to receive the records of prior administrative proceedings, is to hear additional evidence at the request of either party, and, basing its decision on the preponderance of the evidence, is to grant such relief as it determines appropriate.[89]

Several federal district courts have held that the clear import of P.L. 94-142's court review provision is that Congress intended district courts to undertake a de novo review of SEA decisions regarding handicapped children.[90] A de novo review provides an appealing party one last opportunity for a complete evidentiary hearing and an independent decision regarding the education of the handicapped child.

Whether court action may be maintained prior to exhausting administrative remedies under sec. 504 and P.L. 94-142 is uncertain. On its face, P.L. 94-142 requires at least two administrative reviews before a court action may be maintained. Similarly, sec. 504 contemplates enforcement by OCR orders cutting off federal funding to school districts. However, two courts recently faced with this issue did not require exhaustion prior to taking jurisdiction of cases wherein plaintiffs were seeking enforcement of sec. 504 and P.L. 94-142.[91]

REMEDIES

Several decisions have suggested appropriate remedies where the procedural protections of sec. 504 and P.L. 94-142 have been violated. Most frequently, a school district is enjoined from committing any further due process violations.[92] A school district may also be ordered to create, develop, or enforce an appropriate due process hearing system so that all further complaints may be processed in compliance with sec. 504 and P.L. 94-142.[93]

Statutory procedural violations that result in a handicapped student being inappropriately placed or excluded from school are generally remedied by reinstatement to an appropriate placement and an order directing expungement of all records reflecting the inappropriate placement or exclusion.[94]

Possibly more threatening, however, are the financial obligations which may be thrust upon a school district committing due process violations. A successful litigant may be awarded attorney fees under

sec. 504 and under the Civil Rights Attorneys Fees Act.[95] In addition, federal funding may be cut off under both sec. 504 and P.L. 94-142.[96] Also, an agency may be required to provide additional instruction[97] or compensation to a handicapped child improperly excluded from school in an attempt to make up for the child's loss of education or other injuries.[98]

"Punitive" remedies have been ordered for violations of P.L. 94-142 by the reviewing officers of the Washington state educational agency.[99] In each instance, the hearing examiner and reviewing officer found that the school districts had denied handicapped children the fundamental procedural protections of P.L. 94-142, resulting in their constructive exclusion from the public schools. The parents' decisions to remove their children from the public schools and place them in private schools were completely warranted under the circumstances, according to the reviewing officers. Consequently, although private school placement was not necessitated by the particular handicap of either student, the reviewing officers affirmed the orders requiring the school districts to reimburse the parents for the private school placements and for transportation costs.

Citing a Texas federal district court case,[100] a reviewing officer stated:

> "At some point the parents have not only a moral obligation but a legal right to take unilateral action. See Howard v. Friendswood Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978). The right to an appropriate education has no meaning if it can be lost in a time-consuming process of a district hearing and a further appeal to SPI. An entire school year has been consumed while Eric's cause has been processed through the administrative maze. A punitive remedy upon the district for the denial of a substantive right must be given the same status as denial of a procedural right."[101]

Furthermore, school board members who do not carry out the substantive and procedural protections mandated by the fourteenth amendment to the United States Constitution, sec. 504, and P.L. 94-142 may be held individually liable for violations. In the case of Howard v. Friendswood Independent School District,[102] a federal district court ruled that the school district violated its legal obligation under sec. 504 and the Constitution when it constructively excluded a minimally handicapped student from public school. The court suggested that the time had come to begin imposing individual liability under the doctrine of Wood v. Strickland.[103]

"This court has concluded that the board of trustees of FISD has received extremely poor advice concerning its legal obligations and the possible liability of individual administrators and trustees for intentional violation of plaintiff's constitutional rights. In this action, the attention of the board of trustees is respectfully directed to the possibility of personal liability being imposed upon school board members for failure to comply with their legal obligation. (emphasis added)

* * *

"In July, 1977 there may have been some justification for lack of information concerning the trustees' legal obligation. There is no like justification now."[104] (emphasis in original)

Finally, Monell v. Department of Social Services[105] raises the prospect that school districts may be liable for damages for violations of sec. 504 and P.L. 94-142.

CONCLUSION

Certainly, procedural due process, both from a constitutional and statutory standpoint, has come of age in the education of the handicapped. It has been said by many that the procedural protections impede educating handicapped children to a greater extent than furthering that goal.

However, an unstated benefit of these procedures may well be the dialogue which will necessarily take place between school district personnel and parents. There is general consensus that resolution of disputes involving the education of a particular handicapped student through mutual agreement will benefit all involved -- the parents, the school district, and, most of all, the child. As school district legal counsel, it is important to recognize this consensus, while at the same time adequately advising our clients as to the thicket of procedures mandated by the Constitution and the federal statutes.

FOOTNOTES

1. 29 U.S.C. § 794 (hereinafter sec. 504).

2. 20 U.S.C. § 140 et. seq. (hereinafter P.L. 94-142).

3. 45 C.F.R. § 84 et. seq. (1979) and 45 C.F.R. § 121a et. seq. (1979), respectively.

4. Lora v. Board of Ed. of City of New York, 456 F. Supp. 1211, 1227 (E.D.N.Y. 1978).

5. Note, "Enforcing the Right to an 'Appropriate Education': The Education for All Handicapped Children Act of 1975," 92 Harv. L. Rev. 1103, 1105 (1979); and Baugh, "The Federal Legislation on Equal Educational Opportunity for the Handicapped," 15 Idaho L. Rev. 65, 67-71 (1978).

6. 334 F. Supp. 1257 (E.D. Pa. 1971) as modified by 343 F. Supp. 279 (E.D. Pa. 1972).

7. 348 F. Supp. 866 (D.D.C. 1972).

8. 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) (Prior notice and an opportunity to be heard required before city could stigmatize person by posting notices in all retail establishments forbidding liquor sales to anyone listed in the notice due to their excessive drinking)

9. Mills v. Board of Education, 348 F. Supp. 866, 877 (D.D.C. 1979).

10. § 504, 29 U.S.C. § 794, provides in part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."

11. 45 C.F.R. § 121a. 182.

12. 20 U.S.C. § 1412

13. 45 C.F.R. § 84.36.

14. OCR Policy Interpretation No. 6., 43 Fed. Reg. 36036 (1977). This interpretation may be found in the Education for the Handicapped Law Report, CRR Publishing Co., Washington, D.C., in Vol. 2 at 251:03. Hereinafter this service will be cited as EHLR.

15. 45 C.F.R. § 83.3(j) and comments found at 42 Fed. Reg. 22676, 22686 (1977) wherein § 504 is interpreted to apply to drug addicts and alcoholics. P.L. 94-142 provides no such coverage.

16. School districts are one of several public agencies which may provide educational services to the handicapped. State educational agencies, local educational agencies, intermediate educational units and any other political subdivisions of the state may be responsible for providing education to handicapped children. 45 C.F.R. § 121a.11.

17. 20 U.S.C. § 1415 (b) (1) (C) and 45 C.F.R. § 121a.504a.

18. 45 C.F.R. § 121a.505(a).

19. 45 C.F.R. § 121a.505(b) and (c). Note also that the comment to Reg. § 121a.9 provides that "[i]f the person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

20. Id. § 121a.505(c)(3).

21. 3 EHLR Analysis and Comment, P. 1, March 7, 1980.

22. 423 F. Supp. 180 (S.D.W.Va. 1976).

23. Office of Standards, Policy, and Research (OSPR) of the Office of Civil Rights, policy memorandum I/1/45 dated April 20, 1979, 2 EHLR at 259:05; OCR letter to Mr. Jack McConkey dated August 13, 1979, 2 EHLR at 257:46.

24. 45 C.F.R. § 121a.552(a)(3); BEH letter to Dr. Greg Frith dated October 27, 1978, 2 EHLR at 211:84.

25. Doe v. Kroger, 480 F. Supp. 225 (N.D. Ind. 1979), 3 ELHR at 551:515; Southeast Warren Community School District v. Department of Public Instruction, 285 N.W. 2d 173 (1979); 3 ELHR at 551:378; S-1 v. Turlington, Decision No. 78-8020 (S.D. Fla. 1979), 3 ELHR at 551:211; Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978); and OCR letter to Mr. Frank McKenzie dated October 18, 1978, 2 ELHR at 257:25.

26. Paul O., Connecticut SEA Decision No. 79-43 (1979), 3 EHLR at 501:332.

27. 45 C.F.R. § 121a.500 (c).

28. 20 U.S.C. § 1401(18) and 45 C.F.R. § 121a.4.

29. 45 C.F.R. § 121a.504(b).

30. Comment to 45 C.F.R. § 121a.504.

31. BEH letter to Ms. Betsy Primm, June 30, 1978, 2 EHLR at 211:38.

32. 45 C.F.R. § 121a.504(c) (1) and (2) (i).

33. Id. § 121a.504(2)(ii).

34. Wisconsin SEA Decision, March 17, 1978.

35. Palmyra-Eagle School District v. Thompson, Case No. 6722, Dane Co. Cir. Ct. (Wisc. 1978)

36. BEH letter to Mr. Fred Weintraub dated May 3, 1979, 2 EHLR at 211:90.

37. 20 U.S.C. § 1401(19) and 45 C.F.R. § 121a.340.

38. Id. § 121a.343.

39. Id. § 121a.344(a).

40. Id. § 121a.344(b)(1).

41. Id. § 121a.344(b)(2).

42. Id. § 121a.343(c).

43. Id. § 121a.343(d).

44. Id. § 121a.345(a).

45. Id. § 121a.345(c).

46. Id. § 121a.345(d).

47. Id. § 121a.345(e).

48. 20 U.S.C. § 1415(b)(2) and 45 C.F.R. § 121a.506.

49. 45 C.F.R. § 121a.513(a).

50. Id. § 121a.513(b).

51. Comment to 45 C.F.R. § 121a.513. However, substantial disagreement has evolved concerning which are "normal procedures" when children endanger themselves or others. See footnote 25.

52. BEH letter to Mrs. Beatrice Cameron dated October 30, 1979, 2 EHLR at 211:135.

53. Id.

54. 45 C.F.R. § 121a.506(b).

55. Id. § 121a.507. However, this would not prevent a school district from unilaterally selecting another school district's director of special education to serve as an impartial hearing officer. BEH letter to Mr. Harry Onnis dated December 27, 1979, 2 EHLR at 211:138.

56. 43 Fed. Reg. 36036 (1978), 2 EHLR at 251:03.

57. BEH letter to Ms. Lynne Cannon dated September 20, 1978, 2 EHLR at 211:67; BEH letter to Mr. Charles L. Kettler dated August 11, 1978, 2 EHLR at 211:51; and BEH letter to Mr. Walter Kennedy dated January 20, 1978, 2 EHLR 211:07.

58. Compochiaro v. Califano, (D. Conn. 1978).

59. OCR letter to Mr. Ray Waier dated November 29, 1978, 2 EHLR at 257:04.

60. OCR letter to Mr. Gerald Marshall, dated April 6, 1979, 2 EHLR at 257:32; BEH letter to Mr. Glenn Vergason dated April 19, 1978, 2 EHLR at 211:21.

61. In re "A" Family, 48 U.S.L.W. 2347 (Mont. Sup. Ct. 1979).

62. 45 C.F.R. § 121a.508(a)(i); BEH letter to Mrs. Carole Van Lieu dated September 26, 1979, 2 EHLR at 211:129.

63. 45 C.F.R. § 121a.506(c). See also BEH letter to Mr. Gerald Ozan dated March 1, 1978, 2 EHLR at 211:13; BEH letter to Mr. Walter Kennedy dated January 20, 1978, 2 EHLR at 211:07.

64. 45 C.R.F. § 121a.508(a)(2).

65. BEH letter to Ms. Sandy Magee dated October 12, 1978, 2 EHLR at 211:72.

66. BEH letter to Ms. Gail Imobensteg dated March 8, 1978, 2 EHLR at 211:15.

67. 45 C.F.R. § 121a.508(a)(3).

68. 20 U.S.C. § 1415(b)(1)(A).

69. Id. Only by initiating the due process hearing may a public agency avoid this expense. Of course, parents may obtain an independent evaluation at their own expense, and the results of such an evaluation would be admissible into evidence at the hearing. 45 C.F.R. § 121a.503.

70. BEH letter to Mr. Griffin B. Bell, Jr. dated October 2, 1979, 2 EHLR at 211:166.

71. 45 C.F.R. § 121a.508(b)(1) and (2).

72. In the Matter of . . ., New York SEA Decision No. 9945 (1979), 3 EHLR at 501:116.

73. See SEA New York Decision No. 9938, (1979), 3 EHLR at 501:113, wherein it was held that no due process violation occurred when the parents were unable to attend the due process hearing. The parents had been given several prior adjournments and had been informed well ahead of time of the final hearing date set by the hearing officer; and John T. v. Norristown Area School District, Pennsylvania SEA Decision No. 122, (1979), 3 EHLR at 501:229 wherein the SEA reviewing officer held that even though due process procedures had not been carried out in a timely manner, the delays were not immediately objected to by the parents and did not cause harm to the child.

74. 45 C.F.R. § 121a.508(a)(4).

75. Id. S 121a.512(a). This time period may be extended by the hearing officer at the request of either party. 45 C.F.R. § 121a.512(c).

76. In the Matter of the Appeal of Mr. and Mrs. [ ], Wisconsin Decision and Order No. 35 (1979), 3 EHLR at 501:317.

77. 464 F. Supp. 258 (D. Md. 1979), appeal docketed in the 4th cir. on March 30, 1979, 3 EHLR at 551:235. See also Breedon v. Maryland State Department of Education, Cir. Ct., Decision No. 64,987, March 20, 1979, 3 EHLR at 551:262, on appeal to Court of Special Appeals of Maryland.

78. This approach has the tacit approval of BEH. Comment to 45 C.F.R. § 121a.506.

79. It has been reported that the State of Minnesota lost $10 million in federal funds in part for requiring at least one conciliation conference before the mandated federal due process hearing was held. Pennsylvania School Boards Association Bulletin, November-December, 1979, at pg. 37.

80, 45 C.F.R. § 121a.509.

81. 20 U.S.C. § 1415(c) and 45 C.F.R. § 121a.512(b).

82. 45 C.F.R. § 121a.510(b)(1) and (2).

83. Id. § 121a.510(b)(3) and (4).

84. In re D.V., Georgia SEA Decision No. 1979-24 (1979), 3 EHLR at 501:337.

85. In re: Keith S., Washington SEA Decision No. 78-3, January 3, 1979, 3 EHLR at 501:199.

86. In re H.L., Georgia SEA Decision, July 12, 1979, 3 EHLR at 501:289.

87. Breedon v. Maryland State Department of Education, Cir. Ct. Dec. No. 64,987, March 20, 1979, 3 EHLR at 551:262, on appeal to Court of Special Appeals of Maryland.

88. 20 U.S.C. § 1415(e)(2), and 45 C.F.R. § 121a.511.

89. Id.

90. Ladson v. Board of Ed. of the District of Columbia Government, Decision No. 78-2263 (D.D.C. 1979), 3 EHLR at 551:188; New York State Assoc. for Retarded Children, Inc. v. Carey, Decision No. 72-C-356-7 (E.D.N.Y. 1978), 3 EHLR at 551:104; and Lora v. Board of Ed. of City of New York, 456 F. Supp. 1211 (E.D.N.Y. 1978).

91. Armstrong v. Kline, Decision No. 78-172 (E.D. Pa. 1979), 3 EHLR at 551:207; Jose P. Armbach, (E.D.N.Y. 1978), 3 EHLR at 551:245.

92. Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978); Howard S. v. Friendswood Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978); and New York State Association For Retarded Children v. Corey, Decision No. 72-C-356-7 (E.D.N.Y. 1978), 3 EHLR at 501:104.

93. Howard S. v. Friendswood Independent School District, 454 F. Supp. 635 (S.D. Tex. 1978); BEH letter to Powhattan Unified School District No. 150 dated April 6, 1979, 2 EHLR at 257:32; OCR letter to Mr. Frank McKenzie dated October 18, 1978, 2 EHLR at 257:25.

94. OCR letter to Dr. William Randall dated December 20, 1978, 2 EHLR at 257:09; Palmyra-Eagle School District, Wisconsin SEA Decision, March 17, 1978.

95. 20 U.S.C. § 794a(b) and 42 U.S.C. § 1988.

96. 29 U.S.C. § 794a.(a)(2) and 20 U.S.C. § 1416.

97. OCR letter to Mr. Louis Chaney dated March 30, 1979, 2 EHLR at 257:29.

98. There have been conflicting decisions whether a private right for damages is available under § 504 and P.L. 94-142. See: Miener v. Missouri, Decision No. 79-1050 C(2), (E.D. Mo. 1980), 3 EHLR

at 551:512 (no action for damages exists under sec. 504 or P.L. 94-142); Patton v. Dumpson, Decision No. 75, Civ. 4922, (S.D. N.Y. 1980), 3 EHLR at 551:526 (action for damages exists under sec. 504); Loughran v. Flanders, 470 F. Supp. 110 (D. Conn 1979)(no private cause of action for damages under P.L. 94-142); and Boxall v. Sequoia Union High School District, Decision No. C-78-1588 RFP (N.D. Cal. 1979), 3 EHLR at 551:239 (P.L. 94-142 legislative history strongly supports compensatory damages for violations therof). A discussion of the availability of a private right of action for damages is beyond the scope of this paper.

99. In re: Eric P., Washington SEA Decision No. 79-4 (1979), 3 EHLR at 501:170; and In re: Keith S., Washington SEA Decision No. 78-3 (1979), 3 EHLR at 501:199.

100. Howard S. v. Friendswood Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978).

101. In re: Eric P., Washington SEA Decision No. 79-4 (1979), 3 EHLR at 501:170, 501:173.

102. 454 F. Supp. 634 (S.D. Texas 1978).

103. 400 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975). There are indications that federal courts are moving in the direction of requiring compliance with the procedures of P.L. 94-142 and sec. 504 in order to satisfy the constitutional due process rights of handicapped students. See Howard S. v. Friendswood Independent School District, 454 F. Supp. 634 (S.D. Tex. 1978) and Lora v. Board of Ed. of City of New York, 456 F. Supp. 1211 (E.D.N.Y. 1978).

104. 454 F. Supp. 634, 638 (S.D. Texas 1978).

105. 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

PUBLIC LAW 94-142:

IDENTIFICATION AND EVALUATION

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Bellevue, Washington

I. INTRODUCTION

The purpose of this presentation is to provide a working knowledge of P.L. 94-142 and its regulatory requirements relating to the identification and evaluation of handicapped students and their special education and related service requirements. References made will be primarily to the regulations implementing P.L. 94-142 (20 U.S.C. §1401) which are found at 45 C.F.R. §121a.

Both federal and state agencies are responsible for providing interpretations of the law and/or regulations. On the federal level, the Bureau of Education for the Handicapped, Office of Education, is the responsible administrative agency; however, because of the interrelationship between P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973, the Office for Civil Rights also makes decisions that affect school districts in their provision of special education to handicapped children. The Bureau of Education of the Handicapped provides information or interpretation of P.L. 94-142 in one of three ways:

1. By answering individual questions presented to it (Policy Letter);

2. By corresponding with chief state school officers regarding how to apply for and administer programs with P.L. 94-142 funds (Division of Assistance to States: DAS);

3. By issuing policy or position statements to clarify areas which have been of general concern to the public and/or to school districts.

On a state level, both state educational agencies and local school districts are involved in interpreting provisions of P.L. 94-142. Locally, this occurs in the daily implementation of special education programs and as a result of decisions rendered by hearing officers at local level due process hearings. At the state level, interpretation occurs as a result of the state educational agency implementing state law and/or regulations regarding special education requirements. It also occurs when the state reviews a local level hearing officer's due process hearing decision.

In addition to the three levels of administrative interpretation of P.L. 94-142, the judiciary is an additional source of interpretative authority. Both state and federal courts are involved, either as a result of direct appeals to them or as a final step in review of due process hearing decisions.

As a result of the multiple sources of interpretative authority, it is sometimes confusing to determine what the resolution is to a particular question. A reporter service, entitled Education for the Handicapped Law Report, provides a good source of information consolidated from all these levels. It provides B.E.H. and O.C.R. opinions and complaint determinations; state and federal court decisions; and state level due process hearing decisions. It appears to be the only source of B.E.H. and O.C.R. information available on a regular and updated basis for P.L. 94-142 and Section 504 interpretations. Citations to "EHLR" refer to this reporter service.

P.L. 94-142 requires that school districts identify, evaluate, place and provide free appropriate public education (F.A.P.E.) to all handicapped children within their jurisdictions. Although most of the disputed issues and litigation center on placement questions and the appropriateness of the free public education being offered or provided, there are also important issues to be aware of in the areas of both identification and evaluation.

45 C.F.R. §121a.124, .127, .128, and .220 are the regulations primarily dealing with identification; 45 C.F.R. §121a.453, and .530 -.534 are the regulations primarily dealing with evaluation. In addition, fundamental to an understanding and an ability to apply these sections of the regulations are the definitions contained at 45 C.F.R. §121a.5, .13, and .14. These regulations will be reviewed and a survey will be made of the major issues associated with them; most of which are quite straightforward. In addition, a brief review will be made of some ancillary considerations which raise more complicated and less clear policy questions, such as: Is a particular service a "medical" or a "related" service? And, are districts obligated by Section 504 to provide services that are not required under P.L. 94-142?

II. BASIC TERMINOLOGY

1. "Handicapped Children" Defined.

For P.L. 94-142 purposes, a " handicapped child" is one who, having been evaluated in accordance with the prescribed

evaluation procedures, is within one of eleven defined categories of handicapping conditions, and who, because of the handicap, needs special education and related services. Note that for P.L. 94-142 purposes, the handicapping condition must be such that it causes the child to need special education and related services.

The eleven categories of handicapping conditions are described briefly below. Each definition, except one, ties the handicapping condition to educational performance. The full text of the definitions are found in 45 C.F.R. §121a.5(b).

1. Deaf: Severe hearing impairment which impairs processing of linguistic information which adversely affects educational performance.

2. Deaf - Blind: Concomitant hearing and visual impairment causing such severe problems (including educational problems) that a program solely for deaf or blind students cannot appropriately accommodate the child.

3. Hard of Hearing: A hearing impairment, other than one meeting the definition of "deaf", which adversely affects a child's educational performance.

4. Mentally Retarded: Significant subaverage general intellectual functioning along with deficits in adaptive behavior adversely affecting educational performance.

5. Multiple Handicapped: Combined impairment, such as mentally retarded-blind, or mentally retarded-orthopedically impaired, causing such severe educational problems that a program for just one of the impairments is not sufficient.

6. Orthopedically Impaired: A severe orthopedic impairment which adversely affects a child's educational performance. It includes congenital anomaly, disease caused impairments, or impairments from other causes.

7. Other Health Impaired: Limited strength, vitality, or alertness due to chronic or acute health problems, which adversely affect educational performance.

8. Seriously Emotionally Disturbed: Means exhibiting one of the following characteristics to a marked degree over a long period of time, which adversely affects educational performance:

   An inability to learn, not explainable by intellectual, sensory, or health factors;

   An inability to establish or maintain satisfactory interpersonal relationships with teachers or peers;

   Inappropriate types of behavior or feelings under normal circumstances;

   General depression or pervasive unhappiness;

   A tendency toward physical symptoms or fears associated with personal or school problems.

   This classification includes schizophrenic or autistic children, but not socially maladjusted children.

9. Specific Learning Disability: Means a disorder in at least one of the basic psychological processes involved in understanding or using written or spoken language, showing itself as an inability to listen, think, speak, read, write, spell or do math. The definition excludes learning problems resulting primarily from environmental, cultural, or economic disadvantages. (This classification is the only one of the eleven which does not specifically include the statement that the condition adversely affects educational performance, but that is because an adverse impact on educational performance is inherent in the definition of specific learning disability.)

10. Speech Impaired: A communications disorder, a language or voice impairment, such as stuttering or extreme hoarseness, adversely affecting educational performance.

11. Visual Handicap: A visual impairment, which although it may be corrected, still adversely affects a child's educational performance.

To come within the scope of P.L. 94-142, a child must meet the definition of one of these categories as well as be determined to need special education and related services as a result of his or her impairment. This dual requirement is reiterated in Appendix A, an Analysis of the Regulations published at the time the regulations were adopted in final form.

2. "Special Education" Defined.

Since a child must have both a qualifying handicapping condition and a resulting need for special education and related services, it is necessary to be familiar with the definition of the terms "special education" and "related services".

"Special education" is specially designed instruction to meet the unique needs of a handicapped child. It includes classroom instruction, physical education, home instruction, and hospital and institutional instruction. Special education must be provided at no cost to parents, although charging the same incidental fees (such as yearbook costs or special project fees) as are charged nonhandicapped children is permissible. 45 C.F.R. §121a.14.

The Comment to this regulation stresses the relationship between the definitions of special education, handicapping condition, and related services by saying that for P.L. 94-142 purposes, a child is not handicapped unless he or she needs special education. Nor is a child eligible for related services unless the child meets the definition of handicapped by having both a handicapping condition and a need for special education.

3. "Related Services" Defined.

"Related services" are those supportive services that a handicapped child requires to benefit from special education. Related services include transportation, developmental, and corrective services, speech pathology and audiology, physical and occupational therapy, recreation, early identification and assessment of a child's disabilities, counseling services, psychological services, and medical services for diagnostic or evaluative purposes. The term also includes school health services, in-school social work services, and parent counseling and training. 45 C.F.R. §121a.13. Each term is further defined in the regulations.

There are some important questions currently being raised about the scope of the related services definition:

1. Is psychotherapy a psychological service (which means it would be provided at no cost to a handicapped child) or is it a medical service (which if not provided for diagnostic or evaluative purposes need not be provided a handicapped child)?

2. Is catheterization a "school health service" (required to be provided to a handicapped child) or is it a "medical service" (not required because not provided for diagnostic or evaluation purposes)?

3. And, even if a service is not within the scope of P.L. 94-142 requirements, is it mandated by the Office for Civil Rights for compliance with Section 504?

As for question 1 and 3, the Bureau of Education for the Handicapped has said that the determination of whether psychotherapy is or is not a related service is to be made on a state-by-state basis. The question is answered by identifying who provides the service: If psychotherapy is provided by a psychiatrist or licensed physician, then it is a "medical service" and not within the scope of P.L. 94-142 services. Alternatively, if a state allows psychotherapy to be provided by other than a psychiatrist or physician, (such as by a psychiatric social worker), then it is a "related service" to be provided by a school district at no cost to a handicapped student. BEH Policy Letter (April, 1978), 2 EHLR at 211:19.

The complicating factor is that an October, 1979, letter of finding to the Connecticut Commissioner of Education sent by the Office of Civil Rights states that nondiscrimination under Section 504 may well require provision of psychiatric and psychotherapeutic care when it is necessary to enable a handicapped person to obtain the same results, to gain the same benefit, or to reach the same level of achievement to the maximum extent possible. OCR Letter of Finding (October, 1979), 2 EHLR at 257:57. The Office for Civil Rights finds this required not only by Section 504 but also by P.L. 94-142. This interpretation would mean that although psychotherapy may not be required in your state under the BEH's test, it may be required for your school district to comply with the nondiscrimination provisions of Section 504!

Compounding the complications of this issue is the possibility that the Bureau of Education for the Handicapped position's may be changing. At present, BEH is studying the issue preparatory to issuing a policy clarification statement. BEH Policy Letter (October, 1979), 2 EHLR at 211:145.

Part of what makes BEH-OCR positions additionally frustrating is that in the BEH policy letter of April, 1978 to Montgomery

County Schools, there was a specific statement by BEH that, to avoid the possibility of a BEH-OCR conflict, BEH had reviewed its answer (that the determination depended on state requirements regarding who provided services) with OCR and had obtained OCR's concurrence in its opinion! 2 EHLR at 211:21.

The crux of the issue is, of course, how much responsibility does the school district have for a student's educational needs compared to his or her emotional needs.

Courts presented with the issue have generally included psychotherapy as one of the services to be provided by a school district to a handicapped child, although their decisions have sometimes been made indirectly rather than directly on this question. In North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979), the issue was which District of Columbia agent should bear the cost of a child's residential expenses: The educational agency or the agency with responsibility for the child's social and emotional services? Although finding that it might be generally better for a social service agency to take responsibility for meeting a child's emotional needs, the judge ruled that because of the interrelationship between the student's social, emotional and educational problems, the school board must take responsibility for the residential placement of the child in this case.

In Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979) and P-1 v. Shedd, ____ F. Supp. ____ (D.Conn. 1979), 3 EHLR at 551:164, schools were held responsible for services which included psychotherapy.

A Montana state opinion, In the Matter of the "A" Family, 48 U.S.L.W. 2347, Mont. Sup. Ct., 1979), 3 EHLR at 511:345, held that psychotherapy was a related service to be paid for by the school district. The court reasoned that psychotherapy was included within the standard dictionary definition of "psychological services" rather than within the definition of "medical services". For that reason, the court concluded that the district should bear the costs of psychotherapy.

Catheterization is another service debated as to whether it is a medical or a related service. The arguments on both sides of the catheterization question parallel those related to psychological services: if a medical service, catheterization need not be provided; if it is a school health service, it is to be

provided at no cost to the student. (Catheterization involves inserting a catheter into the bladder to allow urine to drain out.) The decisions on this issue are also split. The Texas Board of Education has ruled that catheterization is a medical service and, therefore, not required to be provided free of cost to a child. Amber T. v. Irving Independent School District, Texas SEA Decision, 1979, 3 EHLR at 501:305. This decision was upheld in Tatro v. the State of Texas, 481 F. Supp. 1224 (N.D. Tex, 1979), 3 EHLR at 551:502. The court's decision rested on a determination that to be a related service for P.L. 94-142 purposes, the service requirement must arise from the effort to educate, which in this case it did not. The court also found that Section 504 was not violated, saying that:

> Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs. 3 EHLR at 551:504.

The Office of Civil Rights made the opposite ruling on a Section 504 complaint filed against the North Kansas City (Mo.) School District. OCR Letter of Finding (Nov. 1978), 2 EHLR at 257:04. In that determination, the Office for Civil Rights found catherterization to be a school health service and found failure to provide it violated 45 C.F.R. §84.37a., the Section 504 regulations.

The final resolution of these issues is yet to be determined. Until they are, local and state educational agencies must make determinations based on their best reading of the law and on the needs of their students.

III. IDENTIFICATION

Under P.L. 94-142, both state and local educational agencies share a responsibility to identify handicapped children. At the state level this is an obligation to identify and to count, within general categories, handicapped children. At the local level, the obligation focuses more specifically on identifying individual children. Since one of the purposes of P.L. 94-142 is to ensure that all handicapped children have a free appropriate public education available to them, it is not unusual that the law requires all states applying for funds to identify and to locate all handicapped children needing special education

and related services. 45 C.F.R. §121a.128. In so identifying children, the state is to determine which handicapped children are currently receiving service and which are not, and to make this determination according to disability categories. 45 C.F.R. §121a.128. "All handicapped children" is an encompassing term including children in both public and private schools and institutions within the state.

Each state applying for P.L. 94-142 funds is to include information about the numbers, types and ages of handicapped children within its jurisdiction in its program application. It also is to indicate the number of children receiving and not receiving special education, both in public and private institutions. 45 C.F.R. §121a.124. Furthermore, the state must be able to identify how many children, by disability category and age range, are not receiving any education despite being within the age group to be provided a free appropriate public education; and how many children although served, were not adequately served. These two groups of children are referred to as first and second priority children: After September 1, 1978, the date by which free appropriate public education was mandated, states should be reporting no second priority children, since inadequate education does not meet the requirements of providing a free appropriate public education. 45 C.F.R. §121a.127 and .321.

At the local level, 45 C.F.R. §121a.220 requires each local educational agency to have a procedure for identifying all children within its jurisdiction who are handicapped, regardless of the severity of the handicap. In addition to identifying children, the local educational agency must be able to determine which children are being served and which are not, whether enrolled in public or private insitutions.

There has not been much litigation regarding identification procedures or the failure of states or local districts to identify students. In the case of Mattie T. v. Holladay, ____ F. Supp. ____ (N.D. Miss. 1978), 3 EHLR at 551:109, a class action was brought in 1975 against Mississippi state education officials on behalf of all Mississippi school children who are handicapped or regarded as handicapped. The action alleged several violations of P.L. 94-142 and of Section 504, including failure of the state to provide a program to identify and locate all handicapped children within the state needing special education. Following a summary judgement for plaintiffs, a consent decree was entered in January, 1979, which included procedures to be followed for

a statewide Child Find process. As part of the process, the state agreed to require school districts to appoint a Child Find director; to publicize Child Find activities; and to contact agencies within the district to explain the Child Find referral process and to obtain referrals.

A second case, P-1 v. Shedd, ____ F. Supp. ____(D. Conn. 1979), 3 EHLR at 551:164, involved the Hartford Connecticut School District and the Connecticut Department of Education. Provision of free appropriate public education was the major issue although identification questions were also raised. A consent decree was entered which, on the subject of identification responsibilities, provided an unusual requirement: Each year, the Hartford School District is to review the performance of each student and, where necessary, the files and records of students not previously identified as needing special education to determine if a student should be assessed for special education. The decree lists a number of factors to consider in determining whether to refer students for assessments, including attendance, achievement compared to ability, or health impairments. 3 EHLR at 551:174.

In addition, the State Department of Education agreed to statewide publicity of its Child Find efforts, and to maintain a toll-free telephone line for special education and Child Find week.

A third decision presents a slight twist on the normal identification efforts of school districts in that it varies from the prescribed Child Find obligations. As a result of the district court decision in Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), 3 EHLR at 551:195, regarding provision of education beyond the normal 180 day school year to certain students, guidelines to identify which persons are within the more than 180 day group were developed. These were approved by the courts in December, 1979. 3 EHLR at 551:259. The basic guideline is as follows:

> A handicapped student is entitled to an educational program in excess of 180 days per year if regression caused by an interruption in educational program, together with a student's limited recoupment capacity, renders it impossible or unlikely that the student will attain the level of self-sufficiency or independence from caretakers that the student would otherwise be expected to reach in view of his/her handicapping condition. 3 EHLR at 551:259.

The guideline is to be applied through a special IEP review for students within several categories that contain potentially

eligible recipients. This process was to be completed by January, 1980.

At the state level, there have been at least two interesting administrative decisions regarding identification. These both involve a determination that for P.L. 94-142 purposes, a district was correct in not identifying students as handicapped and providing special education and related services for them.

In one of these cases, the parties agreed that the student was physically handicapped in that she suffered from severe chronic asthma. However, academically her performance was not affected by this and she was performing at grade level. The student's parents were requesting a private school placement whereas the school district contended that it could provide an appropriate education within its system. The State Secretary of Education found that although certain physical accommodations were required by Section 504, the student did not meet the P.L. 94-142 definition of handicapped in that her handicapping condition did not adversely affect her educational performance, and further ruled that the district could provide an appropriate program for her. The conclusion, in this case, was based on the district properly identifying the student as not handicapped. Diane K. v. West Jefferson Hills School District, Pennsylvania Decision (April, 1979), 3 EHLR at 501:227.

A Georgia state administrative decision was similar to the Pennsylvania decision. In the case, In re D.H., Georgia SEA Decision (July, 1979), 3 EHLR at 501:291, the school district refused to pay tuition for a student placed by his parent in a private school. The mother claimed the student was emotionally disturbed, and, therefore,entitled to the private placement. The Hearing Officer and State Board of Education found that the student should not be identified as handicapped. Instead, the student's difficulties (which both parties concurred existed) were caused by family crises, not by any long-term disability. In reaching his decision, the Hearing Officer found that not every case of abnormal behavior must be met by the state providing a special education program to the student.

IV. EVALUATION

A school district receiving P.L. 94-142 funding is required to, and the state is obligated to see that it does, evaluate handicapped children to determine the nature and extent of the child's handicapping condition. "Evaluation" is defined as determining, following

procedures set forth at 45 C.F.R. §121a.530-.534, whether a child is handicapped and the nature and extent of the special education and related services needed. 45 C.F.R. §121a.500. Evaluation requires an individualized determination based on tests administered individually to the child rather than on test administered uniformly to all children in a class or school. The evaluation must be conducted before a child is initially placed in a special education program. 45 C.F.R. §121a.531.

Consideration of the evaluation process can most easily be approached in stages. The first stage is that of preevaluation requirements. The initial requirement is that parents be notified before a school proposes (or refuses) to evaluate the student. This notice must conform to the requirements listed in 45 C.F.R. §121a.505, including a description of the proposed action, including information about each proposed evaluation instrument, and an explanation of the due process procedures available. 45 C.F.R. §121a.502(a).

Also, before a preplacement evaluation (initial evaluation for placement purposes), parents must give their written consent. 45 C.F.R. §121a.504(b). In order for the consent to be effective, parents need to be fully informed of what is to happen (using native language if necessary), must understand the activity, and must be aware that the consent given can be revoked at any time. 45 C.F.R. §121a.500.

Note that while notice is required before every evaluation, written consent is required only before the initial preplacement evaluation. The regulations explicitly state that consent is not required as a condition of any benefit to a parent or child, except for preplacement evaluation and initial placement. 45 C.F.R. §121a.504(b)2. If a parent refuses to give consent and the district believes it necessary to evaluate a child, the district is to use any state-established procedures for overriding the parent's refusal to consent or, if none, may use P.L. 94-142 hearing procedures to override the parent's lack of consent. 45 C.F.R. §121a.504(c).

It is not appropriate to select a surrogate parent as an alternative to obtaining parental consent. Appointment of a surrogate parent is authorized only when no parent can be identified, the parent cannot be located, or the child is a ward of the state. 45 C.F.R. §121a.514. These circumstances do not include appointment of a surrogate because of uncooperative or obstinate parents.

The second stage of the evaluation process is the evaluation itself. Regulations 45 C.F.R. §121a.530-.534 are the heart of the evaluation requirements.

Several issues related to evaluations, in general, have been litigated. In May of 1979, a class action suit was filed against the New York City Board of Education on behalf of all New York City handicapped children (several thousand), aged 5-21, who had not been properly evaluated and placed after the district was notified of their need for an evaluation. Defendants conceded they had not met state regulations requiring evaluation within thirty days and placement within sixty days of identification of possibly handicapped children. The court certified the class and appointed a special master to recommend to the court contents of the decree to be entered.

An order was entered in December, 1979, establishing time lines by which defendants were to submit plans for how they would assure evaluation of identified handicapped children within sixty days, later to be reduced to thirty days, of identification. Additionally, the defendants agreed to staff and operate "school-based support teams", one in each New York City school, to serve all children in need of evaluation and placement.

Plaintiffs in two other similar cases filed against the school board, one on behalf of children with cerebral palsy and one on behalf of handicapped Hispanic children with limited English-language proficiency, participated in formulating the recommendations and presumably are also covered by the decree.

Citations for the cases are: Jose P. v. Ambach, ____ F. Supp. ____, (E.D. N.Y. 1979), 3 EHLR at 551:245 and 551:412; United Cerebral Palsy v. Board of Education, ____ F. Supp. ____, (E.D. N.Y. 1979), 3 EHLR at 551:251; and Dyrcia F. v. Board of Education, No. 79C-2562, filed October 3, 1979.

Another evaluation case is S-1 v. Turlington, ____ F. Supp. ____ (S.D. Fla. 1979), 3 EHLR at 551:211. In this case, two of the nine plaintiffs contended that they had not been properly evaluated and placed and requested a due process hearing. According to the court, defendants may be denied the request for a hearing on the grounds that a hearing was only appropriate to determine whether the results of the evaluation or the program were appropriate, not to determine whether there had been a proper evaluation or I.E.P. developed. The court granted a preliminary injunction which has been appealed.

On appeal, the brief of appellant district states the circumstances somewhat differently, making it difficult to determine what actually happened. The brief states that the students requested a hearing to determine whether or not they had been evaluated, not whether the

evaluation was proper. Futhermore, at the time of the request, one of the students was no longer in attendance and the other had a parent-signed I.E.P. in his file. Brief of Appellant School District (October, 1979), 3 EHLR at 551:353. The appeal is currently pending.

Finally, the issue in Frankel v. Comm. of Education (N.Y.), 480 F. Supp. 1156 (S.D. N.Y. 1979), 3 EHLR at 551:575 was whether, because of its failure to timely and properly evaluate a child, the state was responsible for payment of past private school tuition where the student was unilaterally placed by his parents. The student was placed in the private out-of-state school during the 1975-76 year. The parents petitioned for tuition, alleging violation of state rules regarding evaluation. The state recommended a public school placement instead and denied tuition. The district court action was filed in May, 1978, and was based on the 1975 Education for All Handicapped Children Act. The state contended that the Act, which became effective in October, 1977, should not be applied retroactively to claims arising prior to its effective date even though the claim had been administratively appealed. The court held for the parents, following the rule that a court should:

> Apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice where there is statutory direction or legislative history to the contrary. Frankel, 3 EHLR at 551:576, citing Bradley v. Richmond School Board, 416 U.S. 696, 711 (1973).

This ruling meant that the parents were reimbursed for tuition expenses for school terms prior to the effective date of the statute mandating a free appropriate public education.

There are several detailed requirements designated to insure that tests and procedures used yield an accurate and unbiased evaluation. They include the following:

1. Materials and procedures must be selected and administered so as not to be racially or culturally discriminatory;

2. A child is to be tested in his or her native language, unless it clearly is not feasible to do so;

3. Testing material must have been validated for the specific purpose for which it is used;

4. Trained personnel are required to administer the tests;

5. Tests employed must be designed to measure a particular need rather than general intelligence;

6. Tests used must not reflect the child's handicapping condition instead of whatever aptitude or achievement level the test was designed to measure.

These requirements are contained at 45 C.F.R. §121a.530(b) and .532.

At least two cases have been before federal district courts raising issues of racially-biased testing materials. The first of these, Mattie v. Holladay, ____ F. Supp. ____ (N.D. Miss. 1978), 3 EHLR at 551:109, was settled by a consent decree. The decree provided that the state defendants would hire at least three special education evaluation specialists as consultants to review and assist the state in implementing non-discriminatory testing and evaluation procedures for mentally retarded and learning disabled children. The state also agreed to time frames by which children referred for evaluation would be evaluated.

For educable mentally retarded and specific learning disabled children, the state was ordered to insure that non-discriminatory testing and evaluation was conducted. The "test" to determine this is a statistical one: The placement rate difference for black and white children in E.M.R. programs is to be less than 1.9 percent; in the S.L.D. program, the difference is to be less than .25 percent by May, 1982. How or why these percents assure non-discrimination was not discussed. Mattie T., at 3 EHLR at 551:116.

The other case is that of Larry P. v. Wilson Riles, ____ F. Supp. ____ (N.D. Ca. 1979), 3 EHLR at 551:295. The issue in this case was the use of standardized individual intelligence tests in connection with educable mentally retarded placement. The court ruled that use of such tests which are racially and culturally biased, have a discriminatory impact on black children, and have not been validated for placement purposes violates Title VI Section 504, P.L. 94-142, and the California and U.S. Constitutions. That case is the subject of Mr. Griffin's paper.

In addition, the evaluation must be made by a multi-disciplinary team, including at least one teacher or specialist knowledgeable about the suspected disability area. Furthermore, the child must be assessed in all areas related to the suspected disability, using more than one single evaluation procedure. 45 C.F.R. §121a.532.

There are additional requirements for children suspected of having specific learning disabilities. These requirements are contained

at 45 C.F.R. §121a.540-.543. These provisions include the requirement that an evaluation team member other than the teacher must observe the student's academic performance in the regular classroom setting. 45 C.F.R. §121a.542.

To increase the completeness of the evaluation data, school districts are required to consider documented information from sources other than only the evaluation tests. These other sources include: teacher recommendations, physical condition, social or cultural background, adaptive behavior, and aptitude and achievement test results. 45 C.F.R. §121a.533.

Whether an improper evaluation or the failure to catch and correct an improper evaluation by a later reevaluation gives rise to a negligence action for money damages was the issue in Hoffman v. Board of Education (N.Y.), No. 562 (Ct. Apps. 1979), 3 EHLR at 551:362. At the appellate level, the case was dismissed because such actions, for public policy reasons, are not entertained by courts of the state.

The third stage of the evaluation process is the post-evaluation period. At that stage, issues such as parental disagreement with the evaluation, independent educational evaluation, and reevaluation may arise.

If the parent disagrees with the district's proposed evaluation decision or with its refusal to make a particular evaluation determination, the parents have the right to a hearing conducted in compliance with the due process procedures of the regulations. 45 C.F.R. §121a.504.

Additionally, parents always have the right to obtain an independent educational evaluation of the child. (An independent educational evaluation is an evaluation conducted by a qualified examiner not employed by the public agency responsible for the child's education. 45 C.F.R. §121a.503.) Whether this evaluation is paid for by the parents or by the school district depends upon the circumstances.

The independent educational evaluation is to be provided at public expense unless the district, upon learning that the parents disagree with its evaluation, initiate a due process hearing to show that its evaluation is appropriate. 45 C.F.R. §121a.503(b). If, as a result of the due process hearing, the district's evaluation is determined to be appropriate, then the independent educational evaluation is not provided at public expense. If the district

does not initiate a hearing or its evaluation is not determined to be appropriate, it must see that the independent educational evaluation is provided at no cost to the parent.

At a state-level hearing in New York, a parent contended that the district should pay for two independent educational evaluations, partly because the district had failed to notify the parent of her right to obtain an independent evaluation. The ruling was that the parent had a right to a publicly funded evaluation only if the district evaluation was inappropriate (which it was found to be since it was not a complete evaluation), but that the district need pay only for one, not two, evaluations. In the Matter of the Application of a Handicapped Child, New York SEA Decision No. 10104 (November, 1979), 3 EHLR at 501:299.

In Virginia, the issue was: What constitutes a proper independent educational evaluation? A father argued that an independent educational evaluation meant an evaluation of the child and a determination of program issues such as what teaching methods and materials should be used with the child. The father's argument was based on the definition of evaluations which states:

> Procedures used in accordance with Sections 121a.530-.534 to determine whether a child is handicapped and the nature and extent of the special education and related services the child needs. 45 C.F.R. §121a.500.

The district argued that to interpret the independent evaluation requirement as urged (in this case to decide whether the program would be one of "cued speech" or one of "total communication") would make the I.E.P. process meaningless since decisions about "the specific special education and related services to be provided to the child" are to be a part of the I.E.P. meeting. 45 C.F.R. §121a.346(c). The court ruled in the father's favor. I do not know whether the case is being appealed. Winfield v. School Board of Fairfax, No. 46028, Cir. Ct. Va., Fairfax County (September, 1979).

The other instance in which an independent educational evaluation will be provided at public expense is if, as part of a due process hearing, a hearing officer requests such an evaluation.

If an indpendent evaluation is paid for by the district, it is to be conducted according to the same criteria as normally used by the district, including the location of the evaluation and qualifications of the examiner. 45 C.F.R. §121a.503(e).

According to a BEH Policy Letter, 2 EHLR at 211:132, this does not mean a parent can unilaterally choose an evaluator or insist on going out of state for an evaluation. This view is in keeping with the Comments to the regulations that state that while parents rights to an independent evaluation are to be preserved, a public agency should not have to bear the cost of unreasonably expensive independent evaluations.

A last post-evaluation item to be aware of is that a full evaluation of a handicapped student is to be conducted at least every three years or more frequently if requested by the parents or teacher, or warranted by conditions. 45 C.F.R. §121a.534. This three year re-evaluation requirement is in contrast to the requirement to annually review each student's individualized educational program (IEP).

V. CONCLUSIONS

In dealing with challenges regarding a school district's or state's identification or evaluation process or decision, it is advisable to check a reporter service for up-to-date interpretations and decisions. P.L. 94-142 is relatively new with the full scope of its impact and meaning still being determined.

TESTS AND THE PLACEMENT OF HANDICAPPED STUDENTS

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Discussing the subject of testing handicapped students - in particular, the subject of IQ test - is done with a good deal of reluctance. There is hardly a subject in education that raises the emotions more than the subject of testing. This is particularly true when reviewing testing of handicapped pupils, minority pupils or others who, the prevailing wisdom says, will not do as well on the tests.

PUBLIC REACTION TO TEST RESULTS

Persons involved in education are on the horns of the dilemma when it comes to the testing issue. On the one hand, there is the very strong move in education - and elsewhere in government - toward accountability. With good reason, parents and other taxpayers want to know with some precision what they are getting for their money. California is spending slightly over $8 billion this year for K-12 education. The public wants to know what they are getting for their money. They are particularly anxious about this issue when the press continually points out, correctly or incorrectly, that test scores are declining and that students in greater numbers cannot read, write or compute at satisfactory levels. The answer to this demand is obvious.

Standardized tests are administered at regular intervals and the results are publicized. Taxpayers can see whether their district is doing better than it did last year or is doing better than neighboring districts on such tests as the Comprehensive Test of Basic Skills or the SRA.

California has fostered this competition by developing its own California assessment program. Children are tested every year in the first, second, third, sixth and twelfth grades in reading, language arts, and mathematics. To throw fuel on the fire, the results of these tests are released annually. Virtually every newspaper in the state publicizes the results by state average, district average, and school-by-school average.

A second aspect of this demand for accountability is the push toward high school proficiency standards. More than one-half of the states now require a high school senior to pass proficiency standards as a condition

of graduation from high school. No longer is it possible for a student to graduate after spending four years sitting in class. The student must demonstrate an ability to function at least at a minimum level of proficiency in the so-called basic adult skills. In most states the proficiency tests and the levels to be attained before a student may graduate are specified by the state. In a few states such as California, each district specifies its own area of proficiency and its own minimum levels of performance.

While this point of view is valid, it can be taken to extremes. Most tests must be standardized on a large population if they are to be considered valid in measuring the progress of a district or a school or a pupil. Thus, standardized tests are based on an average. No matter how good your school system is, no matter how much smarter or better educated your children are over those who graduated 20 years ago, one-half of our children will be below average. There is an implication that a school that moves from the 50th percentile to the 45th percentile is regressing and students are not learning. Clearly, this is not necessarily the case.

CRITICISM OF TESTS

If there is a force in favor of testing as a measure of accountability, there is a counter force as well. Tests have come under increasing criticism for a number of reasons, including the following: They consume class time and increase the paperwork burden of schools and teachers; they do not necessarily test what is taught, especially in the affective areas and are not designed to measure movement toward local instructional objections; they are unfair to children who know the material but cannot do well on standardized, machine-scored tests; and the results are misused to label children and place them in inappropriate groups.

Although these arguments are also valid, there is also a danger in carrying them to an extreme. Some children will not score as well as we would like. This is true for a number of reasons. They may be incapable for reason of one handicap or another of keeping up with their chronological peers. The ancient Greeks had a practice of killing the messenger that brought bad news. There is a danger that tests will be rejected because the results are disliked. Some persons believe this is what the court has done in throwing out IQ tests in the assessment of minority children in Larry P. v. Wilson Riles, ___ F. Supp. ___ (N.D. Ca. 1979).

LEGAL IMPLICATIONS

While not belaboring the legal issues inherent in the general issue of testing, it is clear that the issues with respect to handicapped pupils include the issues inherent in the testing of all pupils, handicapped and

nonhandicapped alike. In addition, there are several aspects of these issues which apply with particular force to the testing of pupils with particular kinds of handicaps.

In reviewing some specifics, it is understood that students must be treated with fundamental fairness in the testing process as well as in another aspect of school relationships. Courts tend to view lawsuits between students and schools from the point of the student and inquire whether the school has treated the student with basic fairness. The school must avoid the appearance of arbitrariness and the appearance of having acted for the achievement of administrative convenience rather than pupil welfare.

It is particularly true when the result of the test has important consequences for the future education of the student. In some instances the score of the student on a test - particularly if you consider tests in a broader sense in assessment - the result of the assessment process means placement for a pupil at least for a year and perhaps longer.

Within this framework of fundamental fairness there are at least three legal problems facing schools in the general area of testing. First, the school must have a right to test whatever it is they are testing. There is no doubt that a school has the right to post test a child to determine whether they learn the curriculum to which they have been exposed. In many instances, however, one must question why the school needs to know whatever it is they are testing. Why does the school need to know the aptitude of the pupil? Why does the school need to know "intelligence"? The answer to these questions depends, in part, upon what the school does with the result.

The second major legal requirement is that there must be a reasonable relationship between what is being tested and the method issued by the school to assess proficiency in that area. The reference to "tests" brings to mind pencil and paper tests but the district should first consider "hands on" assessments whereby students can demonstrate their competence at a skill by doing rather than by describing. Many children do not do well in a structured testing situation. In the assessment of children who are mentally retarded there is a strong effort to focus on adaptive behavior as a supplement to academic functioning to avoid misidentification of children who score poorly on tests but who function adequately in their environment. Deaf, blind or physically handicapped pupils may need alternative methods of demonstrating their knowledge or skill.

It is also necessary to be cautious in administrating written or oral assessments to children in the English language alone. It is one thing to require a student to communicate in English as a skill area and to deny a a student a satisfactory grade in an English class if he or she does not

do so. It is another matter, however, to purport to test a child's skill in math through a pencil and paper test in the English language. It is obviously unfair to fail a child in math if the problem is an inability to understand the question in English. However, it was not so long ago that Hispanic and other children were placed in classes for the educable mentally retarded on the basis of group IQ tests administered in English.

The third major legal consideration is that there should be a relationship between what is tested and what is taught in school. Most standardized tests presuppose relatively the same degree of exposure to the information tested. To the extent that IQ tests measure mental processes and functioning, this assumption is not particularly unfair. For example, if a child is asked "What is the next number in this sequence: 2, 4, 6, 8, ___?", either the child sees the relationship or not. It is very difficult for a child's answer to be influenced by environmental factors. But if the child is asked "What do a pineapple and a banana have in common?", the child may be at a disadvantage. The question purports to measure the ability of the child to form generalizations but instead may measure his vocabulary.

Again, part of this problem is the use of the results. Affluent children generally enter school with a higher reading or reading readiness level than do poor children. Where the purpose of the test is to identify children who need reading help, a test is fair. But it is unfair to draw conclusions about a child's ability to learn from the fact that he has not yet learned.

It is interesting to note the way in which these principles apply in the case of Larry P. v. Wilson Riles. The complaint in that case was originally filed in 1971 challenging as unconstitutional the use of standardized intelligence tests for the placement of black children in classes for the educable mentally retarded in San Francisco. In December of 1974 the class of children represented in the suit was expanded to include all black children in the State of California who have been or may in the future be classified as mentally retarded on the basis of IQ tests. At that time a preliminary injunction enjoined the Superintendent of Public Instruction and the State Board of Education from "placing black children in California into classes for the educable mentally retarded on the basis of the results of any tests which do not properly account for the cultural background of these children".

In an opinion dated October 16, 1979, the court found for the plaintiffs that standardized IQ tests discriminate against the black pupils on the basis of their race and enjoined their use in California for the placement of black children in EMR classes. The Superintendent of Public Instruction has filed an appeal from the subsequent judgment on a number of grounds.

The opinion of the court does not seem to make a good deal of sense because it does not appear to deal consistently with the basic issues inherent in the testing process.

RIGHT TO TEST

Does a school have the right to test what is being tested? In the context of this case the question is whether the school has the right to test the intelligence of the child at all. The plaintiffs proceed from the fundamental philosophy that there is no such thing as intelligence, at least in any measureable sense that distinguishes one child from another. They submit that intelligence in our society consists of a number of attributes, including creativity and the ability of a person to interact appropriately with his or her environment; most of these factors are not measured by an intelligence test. Since there is no such thing as a measureable quantity called "intelligence", any score which purports to measure that quantity in any particular child is an illusion.

Although intelligence may be an illusive concept, the plaintiffs essentially missed the point. In the first place, intelligence tests clearly measure intellectual processes and do not reflect mere achievement in the sense of cultural exposure to specific concepts. They do measure abstract reasoning; they do measure short term memory; and they do measure the skills a child needs to succeed in school which is an academic and intellectual experience rather than a social one. It is not facetious to suggest that IQ tests do, in fact, test what they test. Regardless of whether one defines as what they test as innate "intelligence" or something else, they are accurate predictors of later success in school and through standardization very accurately compare the skill of a child with the skill of a large number of that child's chronological peers. For example, the test can measure the ability of a seven-year old to memorize a seven digit number like the child's own telephone number. A certain percentage of children that age can memorize that number and another percentage cannot. Whether the ability to remember your telephone number is defined as part of "intelligence" or not, the exercise is a valid measure of the child's mental maturity.

In the second place, the argument of the plaintiffs which the court has accepted misconstrues the purpose for which the tests are given. At one point in time, the total score on an IQ test, be it 68 or 76, was the major determinant if not the sole determinant of where that child should be placed. The state of the art, however, has progressed well past that point. In fact, the purpose of the test, properly used, is not to determine placement at all. The purpose of the test is to diagnose the educational needs of the child so that an appropriate educational program may be prescribed which maximizes the child's opportunity to succeed. For example, a common occurrence in a regular classroom is for the teacher to instruct the pupil to take out a piece of paper and pencil and put their name and date in the upper right hand corner. While such an instruction seems elementary, it is really four separate instructions. Some children cannot remember four instructions in a row at their stage of mental maturity. Again, it is not necessary to consider short term memory as a part of "intelligence" or as a part of anything. However, in planning a program for the child that bit of information

is helpful to know.

It seems that California no longer recognizes the EMR classification. Under the categorical aid programs that existed in California and elsewhere, a child had to be identified or labeled as having a particular handicapping condition before being eligible for service at all. However, California has developed what is called the master plan for special education which does not look at the child's handicapping condition but requires districts to look at the level of service needed for that child under the individualized education plan. A resource specialist has been added to the regular school so that children may receive assistance in that school, thereby, facilitating the mainstreaming concept. The district must consider the spectrum of educational placements from the least restrictive (i.e., placement in a regular class with minimum intervention), to the most restrictive (such as a private school or a special education center). The question then becomes not "What is this child's handicap?" but "Where on the spectrum of placement can this child best function?" The information offered by standardized IQ tests offers information helpful in making that determination.

REASONABLE NEXUS

The second legal requirement is that of a reasonable nexus between what is being tested and the method used. The court really doesn't discuss this issue but instead assumes as do the plaintiffs that intelligence cannot be measured.

It is recognized that the educational needs of the child cannot be determined through any one test or any one assessment. A number of areas must be examined in order to determine why a child has not succeeded in regular class placement at that time. A much improved process has been developed over that which was commonly used just a few years ago and will probably be much improved in the coming years. At this point, however, the basis for the process is a belief that a child should be examined from a number of points of view and that the determination of education needs should be consistent with these various prospectives.

For example, the developmental history should be documented, and the adapted behavior of the child should be measured both in the classroom situation and in the home. The child's sociological background should be noted, including any factors relating to home support for school or the lack thereof. Of course, the pupil's academic success should be documented, including the results of special programs, such as bilingual education, compensatory education, or other special help. It is also stressed that the child should be tested in the primary language of the home or the language or languages in which the child communicates best. Admittedly the diagnosis of educational need is a very inexact science. However, schools cannot afford to overlook the evidence merely because it does not set well with ideals of how things ought to be.

BIAS

The third major consideration is the child's exposure to the information tested. There are two points to be made in this regard. First, the IQ test must be administered by a professional trained in the testing process and knowledgeable of the child's language and cultural background. The assessor must be cognizant of vocabulary or concepts to which the child may not have had in the same degree of exposure as a child from the so-called "core culture". The answer that the child gives to those particular questions must be interpreted in the light of this exposure. Second, there is nothing inherently wrong with the child failing the test which measures his exposure to the core culture so long as the result of such failure is the prescription of the compensatory program which compensates him for that lack of exposure. Again, it is not necessary to determine whether a child is incapable of learning or is merely uneducated. For educational purposes, it is enough to observe that the child does not have a particular skill or mastery of a knowledge area in this point in time. The individualized education program should take the child from where he is to wherever he can go.

Much has been said about bias on IQ tests. Bias to the plaintiffs is measured by whether blacks fail the test in disproportionate numbers. Bias to a testor is whether the tests measures what it is supposed to measure. This distinction is crucial. Under the plaintiffs definition of bias a tape measure would be biased if it shows that Asians as a group are shorter than blacks as a group. However, if a test accurately predicts who will succeed and who will fail in an academic classroom and predicts just as accurately for blacks as for whites and for poor children as rich children, the test does what it is supposed to do. It must be recognized that for reasons not fully understood, poor children do less well in our schools than rich children.

COURT'S CONCLUSION

At any rate, the court observed the phenomena that black children as a group do significantly less well on an IQ test than white children as a group and concluded that IQ tests were inherently biased against black children because of their race and thus violated Title VII of the Civil Rights Act, the Rehabilitation Act of 1973 and the Education for all Children Act of 1975. Clearly then, they had to be banned for all black children but only as to placement in the EMR classes.

The judge made a quantum leap as there is a significant disparity in some districts between the percentage of black children enrolled in the district and the percentage of black children enrolled in EMR classes. However, districts do not test all children. Traditionally, the only children who had been tested are those referred by classroom teachers. Neither the plaintiffs nor the State have any figures at this time as to the racial and ethnic characteristics of the children to whom the IQ tests

are administered. To give an example, assume a district has 10% black pupils but 25% of the pupils referred for testing are black. Assume further that 25% of the children diagnosed as retarded as a result of the test are black. It is obvious in this example that the test is absolutely neutral as to race and that the problem with the racial balance of the class is in the referrals and not in the testing.

There was one other bit of information that the court saw fit to ignore. The result of the injunction in the 1974 banning of the use of IQ tests is a reduced number of children placed in EMR classes, but the racial balance of the children placed has remained constant. In other words, the ban on the IQ tests 5 1/2 years ago has not reduced the disproportion of blacks in the EMR program. It seems obvious that to the degree that standardized tests are not used in the diagnosis, the judgment becomes more subjective. There is no reason to suppose that teacher judgment is less biased that standardized tests. Therefore, the court, in an effort to protect black children from its own opinion, must impose a racial quota on the admission of black children in EMR classes. This the court has done through a rather unusual formula which essentially limits the percentage of black children in EMR classes to the percentage of such children in the district as a whole.

In short, school districts in California are appealing the Larry P. decision on two basic grounds. First, to object very strongly to the imposition of a racial quota on any child. When a child is tested in any process and found to be in need of placement, the child should get that placement without regard to the race or ehtnic group identification of children already in the program.

Second, the banning of IQ tests is an overreaction due to the fact that they offer valuable information. If the ban was on the use of tests of major determination of placement or if the ban was on the use of the total IQ score, there would be agreement. But to the extent that the ban prevents schools from using subpart information in the diagnosis of a child's educational need, there is no agreement.

EDUCATIONAL PLACEMENT OF THE HANDICAPPED--SELECTED ISSUES

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I. INTRODUCTION

The educational placement of the handicapped is governed by a blend of federal and state constitutional, statutory and regulatory mandates, all of which must be fully understood and appreciated before it can be determined whether a particular educational placement is "legal" or, in the vernacular, "appropriate". This article will focus on those various mandates, with particular emphasis on the definition of an appropriate education, year-round programming, residential placements, out-of-state placements, selection of classrooms, and the problems attendant expulsions and suspensions of handicapped students.

Unfortunately, in all of these areas, relevant constitutional, statutory, and regulatory mandates are yet to be fully or clearly defined by the courts. To the extent that this is true, speculation will be engaged in, for, as Mr. Justice Holmes once noted, the law is nothing more than "the prophecies of what the courts will do in fact."[1] Where the law has been defined, that will be reported herein; but, where the requirements of law need to be speculated upon, the perspective will be that of a school board attempting to preserve its traditional perogatives and to allocate its finite resources fairly while at the same time providing adequate programs for the handicapped within the spirit and intent of the Rehabilitation Act of 1973 [hereinafter referred to as "Section 504"] and the Education of all the Handicapped Act of 1975 [hereinafter referred to as "P.L. 94-142"].[2] This perspective has been selected because it is the only one that gives due consideration to all competing interests. Admittedly, the handicapped are deserving of adequate programming; but non-handicapped students attending public schools are entitled to educational programs appropriate to their needs which are undiminished by any sort of crusade which diverts excessive resources from the normal programs.

II. DEFINING AN APPROPRIATE PROGRAM

The quintessential principle of placement is that all handicapped students must be provided with a "free appropriate public education", which, in practicality, means a program to which the parents and schools agree. Where there is no such agreement, an appropriate program is whatever the experts say it is at a due process hearing. If the parents and the school cannot agree as to a particular program, a particular service, or a particular school, a battle of experts will be resolved by a hearing officer based generally upon facts, not legal principles. However, there will be times when the nature of the dispute is such that

it cannot be decided merely by resolving conflicting expert testimony. Instead, the conflict can be resolved only through a thorough resolution of the legal meaning of the phrase "free appropriate public education". Cases involving such disputes will be comparatively infrequent, and are almost nonexistent at this point in time, but it is with a view towards such cases that the following discussion is presented.

Any analysis of the legal definition of a "free appropriate public education" must naturally begin with the statutory definition, which is as follows:

> "(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction without charge, (B) meet the standards of the state educational agency, (C) include an appropriate education in the state involved, and (D) are provided in conformity with the individual education program required under Section 1414(a)(5) of this title." 20 U.S.C. §1401(18).[3] (emphasis added)

The phrases "special education" and "related services" are also specifically defined in 94-142:

> "(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions." 20 U.S.C. §1401(16).
>
> "(17) The term 'related services' means transportation, and such developmental, corrective and other supportive services . . . as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." 20 U.S.C. §1401(17).

As is readily apparent, these definitions are not a model of clarity.[4] They are only minimally helpful in actually defining in any given situation what sort of an educational program is required. They provide no guidance, for example, as to the length of the program, class size, educational content, required services or any other specific educational item, leading one commentator to note:

> "Although the act sets forth the general requirements states must meet in order to qualify for receipt

> of federal funds, it does not prescribe the specific educational programs local schools must make available in order to fulfill those requirements. Instead, the heart of the federal control mechanism is a system of procedural safeguards which provides for parental involvement and educational placement decisions. In effect, the act guarantees procedures whereby parents may challenge the appropriateness of their child's educational program, but provides only the most general guidelines for resolving the substantive questions such challenges may present.
>
> Enforcing the right to an 'Appropriate Education: The Educational for All Handicapped Children Act of 1975." 92 Harv. L.R. 1103 (1979).[5]

This lack of statutory specificity has effectively allowed the courts to define what Congress intended and to assume the unrestricted power of dictating what is required in any given situation. One court has stated: "it has been left entirely to the courts . . . to give content to the requirement of an 'appropriate education'". Rowley v. Hendrick Hudson Central School District, 483 F. Supp. 528 (S.D. N.Y. 1980).

In assuming the power of unilaterally determining the appropriateness of educational programs, the courts have adopted different standards, which are often in conflict with one another. In Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), the court held that a free appropriate education is one which maximizes educational benefits in the area of self-sufficiency and freedom from caretakers. In Rowley, on the other hand, the court rejected the maximization standard of Armstrong, and held that an appropriate education is one which gives a handicapped child an opportunity to achieve his full potential commensurate with the opportunity provided to other children.

It is suggested, however, that both these standards are in error, and that the error flows directly from the courts' misunderstanding of Congress' lack of specificity in defining the phrase "free appropriate public education". If there is any point that must be stressed, it is that the lack of statutory specificity was by congressional design, not accident, and that in refusing to specifically define an appropriate program, Congress remained committed to preserving local control over public education.[6] Indeed, by statutory definition, a "free appropriate public education" is one which "meets the standards of the state educational agency". 20 U.S.C. §1401(18).

Commenting upon the underlying reasons why P.L. 94-142 was specifically vague in defining appropriate programs, one writer said:

> "Perhaps the most significant reason Congress failed to prescribe more specific standards was the traditional notion that education is primarily a state and local concern. Despite the far-reaching procedural provisions of the present statute, Congress was apparently unwilling to take the further step of ordering that process that could lead to federal allocation of state and local funds. In the end, the hard choices required to determine the extent of the right of particular children were consigned to the discretion of local administrators . . . . " "Enforcing the Right to an 'Appropriate Education'". 92 Harv. L.R. at 1109.

Importantly, in resolving a variety of issues impacting upon public education, the United States Supreme Court has favored those interpretations consistent with the preservation of local control[7] and it is suggested that in the context of educating and providing services to the handicapped, such an interpretation remains logical.

Primarily, it is each state that must allocate its finite resources among the various programs it operates and it should properly be left to the officials of those states to make the difficult decisions necessary to meet the needs of their constituents. Secondarily, the programs and services required to be provided by the states as a result of P.L. 94-142 in many instances will overlap programs and services which had already been provided by the states as a result of state health and welfare programs designed to benefit the handicapped and it should be left to the discretion of the states to coordinate the existing structure with that required by P.L. 94-142.

That is not to suggest, however, that states are free to adopt any standards seen fit. On the contrary, consistent with any governmental action, perogatives that states enjoy under P.L. 94-142 are limited by constitutional imperatives in general and equal protection in particular.

Generally, equal protection requires that handicapped pupils be provided with a level of educational input which is at least minimally beneficial or functional. There are numerous federal court decisions which vividly illustrate that if beneficial programs are being provided to students, the equal protection clause is not being violated, even though other students may be receving better programs.[8]

Defining a "free appropriate public education" in the context of the equal protection decisions, if a minimally beneficial or functional education is provided under state standards, those standards should serve effectively to define the appropriateness of any particular program under P.L. 94-142.

The definition of a free appropriate public education which is being advanced herein finds support in the legislative history of P.L. 94-142.[9] It appears that P.L. 94-142 was in fact enacted by Congress primarily to enforce the equal protection clause, the court concluding in Rowley, that the equal protection clause "motivated the passage of the Act". Specifically, Section 3(a) of P.L. 94-142, provides as follows:

> "(9) It is in the national interest that the federal government assist state and local efforts to provide programs to meet the educational needs of the handicapped children in order to assure equal protection of the law." (emphasis added) 20 U.S.C. §1401,n.[10]

Consequently, an interpretation is justified and ought to be vigorously advanced to the courts that Congress intended primarily to insure compliance with the equal protection clause of the federal Constitution through the offer of financial awards to the states.

If P.L. 94-142 was in fact enacted by Congress to enforce the equal protection clause, as it appears it was, then P.L. 94-142 would not seem to require states to maximize benefits to or achievement of the handicapped. Rowley v. Hendrick Hudson School District, supra; contra, Armstrong v. Kline, supra. Primarily, P.L. 94-142 does not contain any language from which it can be said that maximization is required and the legislative history exhibits Congress' rejection of maximization.[11]

The conclusion that a state is not required to provide the most beneficial program to handicapped students was adopted by at least two courts. In Krawitz v. Kline, ___ Pa. Cmwlth. ___, 408 A.2d 1202 (1979), the parents of a handicapped child sought an out-of-state residential placement for their child, claiming that an out-of-state placement was the most effective. In denying their claim, the court said:

> "We can find nothing in the statutes or regulations which requires the approval of a 'more appropriate' program when an appropriate educational program exists . . . ." 408 A.2d at 1204.

In Rowley, parents of a deaf child brought an action to have their daughter provided with a sign language interpreter in the classroom. In ruling that maximization is not required, the court said:

> "An 'appropriate education' could mean an 'adequate education' -- that is, an education substantial enough to facilitate a child's pro-

> gress from one grade to another and to enable him or her to earn a high school diploma. An 'appropriate education' could also mean one which enables the handicapped child to achieve his or her full potential. Between these two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the equal protection decisions . . . and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."

See also, Fitz v. Intermediate Unit #29, ___Pa. Cmwlth. ___, 402 A.2d 138 (1979).

Likewise, the language of P.L. 94-142 indicates that only a beneficial program, rather than the most beneficial program, is required. In the definition of "related services", only those services that are necessary to "assist a handicapped child to benefit from special education", are required. 20 U.S.C. §1401(17) (emphasis added). Similarly, in determining the services to be provided to handicapped students attending private schools, the regulations adopted under P.L. 94-142 state that public schools may "provide special education and related services to private school handicapped children which are different from those provided to public school children if the special education and related services are 'comparable in quality' to those provided public school children." 45 C.F.R. §121a.455(b). Obviously, if the administrators interpreting P.L. 94-142 were concerned with preserving comparable quality, they were starting with the assumption that quality would be different from state to state, an assumption at odds with a theory that P.L. 94-142 mandates maximization or programs of the highest quality at all times.

Therefore, if the parents of a handicapped child advance an argument that a peculiar item is necessary in order to maximize the child's development in one area or another, if the state's standards do not require maximization, neither does P.L. 94-142.

In the final analysis, the degree to which states and school districts can successfully defend claims by handicapped children and their parents for programs which differ in quality and kind from that which the states and school districts are willing to provide, will in a large measure depend upon the degree to which hearing officers and the courts can be persuaded that the statutory definition of a free appropriate education, while admittedly vague, is not to be interpreted to include literally everything that is arguably just, but is based upon several concrete principles that provide more than an adequate means of giving

substance to the statute. First, and foremost, state standards must be effectuated, subject to the constitutional guarantees of equal protection. If this point can be successfully advanced, states and school districts should be able to service adequately the interest competing for their resrouces.

III. SELECTED ISSUES

A. Year-Round Programming

One of the most significant questions yet to be decided under P.L. 94-142 involves year-round programming. Obviously, if year-round programming is mandated, the costs of educating the handicapped would tremendously escalate. It has been estimated that year-round programming could increase educational costs across the nation by a billion dollars annually.

In Armstrong v. Kline, supra, several severely handicapped children brought a class action suit on behalf of themselves and a class of handicapped student who "required" year-round programming. The plaintiffs claimed that they were entitled to year-round programming on the basis that due to the nature and severity of their handicaps, they regressed more than normal children during breaks in their programming, such as the traditional eight weeks summer recess, and it took a substantial amount of time after each break to recoup their losses. Therefore, the plaintiffs contended that they were on an educational treadmill and not able to benefit as much as they would otherwise. The Commonwealth of Pennsylvania and the defendant school districts defended the suit on the basis that state standards required only 180 days of instruction, and that under that standard, all handicapped children could obtain an appropriate program.

In granting the plaintiffs' claims, the court reasoned that P.L. 94-142 required an educational program to meet each handicapped child's "unique needs", that a child's unique needs are defined in the context of achieving the goals of P.L. 94-142 and that the goals of P.L. 94-142 are to insure self-sufficiency and independence from caretakers to the greatest extent possible. The court expressed its rationale as follows:

> "The Act appears to demand that the state supply instruction designed to meet all of the handicapped child's 'unique needs' without limitation. * * * To determine which unique needs of the handicapped child must be met . . . , it is useful to approach the problem by asking what is the goal of the education that the Act requires the state to provide. * * * The congressional intent was to

provide for that education which would leave these children, upon school's completion, as independent as possible . . .."

Armstrong v. Kline, supra, 476 F. Supp. at 602-04.

A critical review of the court's decision, however, reveals several arguable errors. The following have been advanced to the court on appeal.[12] First, the court's definition of an appropriate education completely ignores state standards. Second, the court mandates maximization as it relates to self-sufficiency. However, as was discussed previously, it appears that Congress did not intend maximization in any respect. Third, the court's decision to define the mandates of P.L. 94-142 in terms of the goals of the act is in disregard of the simple truth that statutory mandates and goals are distinct. Pierce v. Board of Education of the City of Chicago, 370 N.E. 2d 535 (Ill. 1977). Fourth, the goal ascribed to P.L. 94-142 by the Armstrong court is of questionable validity. As discussed previously, it appears that the primary congressional concern was to enforce the equal protection clause, not to create a national school code for the handicapped, whereby the handicapped would be given unlimited educational opportunity in order to insure self-sufficiency to the greatest extent possible. Further, the court based its conclusion as to the purposes of P.L. 94-142, not from legislative language or committee reports, but from floor debate in Congress, one of the weakest supports for statutory construction. McCaughn v. Hershey Chocolate Co., 283 U.S. 488 (1971). Fifth, the court disregarded the cause of the pupils' regression. Obviously, if during vacations parents or guardians fail to perform their obligations, regression will be accelerated. Sixth, the court's order to pursue the goal of self-sufficiency in all cases regardless of cost necessitates in some instances the pursuit of the impossible at terrific cost to the taxpayers. Lastly, a legal standard, such as was established by the Armstrong court, which is based upon maximization of progress improperly presupposes that the success of an educational program was dependent solely upon the program itself. However, numerous courts have held that educational success is dependent upon a variety of factors independent of the educational program. Peter W. v. San Francisco Unified School District, 60 Cal. App. 3d 867, 131 Cal. Rptr. 854 (1976); Donahue v. Capiague Union Free School District, 407 N.Y.S. 2d 874 (1978). This being true, the court's standard in Armstrong cannot be judcially managed. McInnis v. Shapiro, 393 F. Supp. 327 (N.D. Ill. 1968).

Although it is suggested that the Armstrong court erred in other contexts, year-round programming may be properly ordered by hearing examiners or the courts. This would occur wherever state

standards authorized or required such programming. As indicated previously in this paper, a "free appropriate public education" is defined in the context of state standards; and it would consequently be difficult, if not impossible, to argue successfully that year-round programming was not required under P.L. 94-142 where it was required under state standards.

Another context in which year-round programming could conceivably be properly ordered by the court would be where it was required by equal protection. As discussed previously, the discretion that states possess under P.L. 94-142 to establish their standards is limited by the equal protection clause. Therefore, if a handicapped student could show that an educational program confined to the traditional school year did not enable the child to benefit, then that program would not pass muster constitutionally. However, it is suggested that rarely, if ever, will a handicapped child be able to establish such a fact.

In Armstrong, several of the named plaintiffs were severely and profoundly handicapped. Counsel for the plaintiffs were experienced, thorough and well-financed. Well-qualified experts were retained by and testified for the plaintiffs. However, the plaintiffs were unable to prove, and the Armstrong court notably did not find, that any child was unable to benefit from a 180-day program. On the contrary, the essence of the testimony was that all of the plaintiffs, even the most severely handicapped, benefitted in some measurable and recognizable way from a 180-day program. Therefore, while it may be possible that a plaintiff may be able to show that an extended or year-round program is needed in order to produce any progress, from the testimony given in Armstrong, such appears unlikely.

Another case involving year-round programming is Mohoney v. Administrative School District No. 1, ___ Cal. App. ___, 601 P.2d 826 (1979). The issue in Mohoney, however, was somewhat different from that in Armstrong. In Armstrong, the Commonwealth of Pennsylvania and the school districts asserted the position that 180-day program was appropriate. In Mohoney, on the other hand, the school district conceded that the child required year-round placement, but argued that it was not responsible for the entire cost of the program. Rejecting that argument, the court held that once it is determined that a particular program was appropriate, the states and school districts are responsible for underwriting the entire cost of the program. The lesson to be learned from Mohoney is that once appropriateness of a program was conceded, other defenses, such as financial ones, will fail.

In the Matter of George Jones, 98 Mics. 2d 562, 414 N.Y.S. 2d 258 (1979), also involved year-round programming. As in Mohoney, all parties conceded that year-round programming was required, the only issue being who was going to pay for it. Basing its decision exclusively on state law, the court held the state and school district were to assume the entire cost of the program.

Before passing from this issue, it is perhaps appropriate to indicate why the experts in Armstrong felt that year-round programming was required. Interestingly, they were not uniform in their opinions. One testified that any student that needed physical therapy needed year-round programming. Another testified that children who have not developed a "real image of themselves" or who exhibited abusive sexual behavior need year-round programming. A third testified that some handicapped students needed year-round programming because they needed as much peer interaction as possible. Perhaps most shockingly, from the context of the proper mission of the public schools, is the testimony of a fourth expert who indicated that year-round residential placement is necessary where there is a possibility of child abuse or danger to the family. None of the experts in Armstrong testified that year-round programming was necessary from an educational standpoint. It is suggested that the schools have not been designed to cure the problems about which these experts spoke and to the extent that the courts fail to recognize this basic fact; the basic mission of the public schools will inevitably be altered.

B. Residential Placement

Quite often, the dispute as to the appropriateness of a particular program centers upon the location of the program; for example, in a day-school setting or in a residential setting. Oddly enough, neither parents nor school uniformly take one position or the other on this issue; and the relevant rules may be two-edged swords. Often, for both selfish and non-selfish reasons, parents want their child placed in a residential setting, even though an appropriate program can be provided in a day-school. When a dispute arises, it is frequently because the school is concerned about the extra expense of residential placement. On the other side of the coin, parents may demand a day-school placement where the nature of the handicap makes such a placement highly impractical, if not inappropriate. In this situation, from the school's standpoint, the impracticality of the matter usually outweighs the extra cost of the residential placement.

Generally, P.L. 94-142 mandates "mainstreaming" or placement in the "least restrictive environment". In order to qualify for P.L. 94-142 funds, each state must establish "procedures to assure that, to the

maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children from regular environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. §1412(5)(B). Essentially, both the Section 504 regulations, 45 C.F.R. §84.34, and the P.L. 94-142 regulations, 45 C.F.R. §121a.302, 121a.550-121a.553, track this statutory provision.

Even where residential placement is required, mainstreaming nonetheless plays a part. Both the Section 504 and P.L. 94-142 regulations require that where residential placement is appropriate, states must nonetheless insure that handicapped person participate with non-handicapped persons in non-academic and extracurricular activities to the maximum extent possible. 45 C.F.R. §84.34(b).

Necessarily, the decision as to whether residential programming is required or "appropriate" in any given case under the foregoing rule of law is largely a question of fact. In Levy v. Department of Education, ___Pa. Cmwlth. ____, 399 A.2d 159 (1979), for example, a day-school program was rejected by the court in favor of a residential placement on the basis that the expert testimony illustrated that a day-school placement "would be deleterious to [the child's] educational, social, and emotional well-being." 399 A.2d at 163.

Where residential placement is necessary, for educational reasons, the program including non-medical care and room and board, must be at no cost to the parents. 45 C.F.R. §121a.302, 45 C.F.R. §84.33(c) (3). However, if an appropriate placement can be provided in a public day-school, but the child's parents choose to place the student in a private residential program, the public school system is not required to pay any of the costs of the placement. 45 C.F.R. §84.33(c) (4), 45 C.F.R. §121a.403. Furthermore, if residential care is necessary because of the student's home conditions, the public schools are not required to pay the costs of room and board, but only the costs of the educational program. Comments to Section 504 regulations, 42 Fed. Reg. No. 86, p. 22691 (May 4, 1977). Also, it has been held that where parents place their child in a residential program, but refuse to make their child available for an evaluation, the public school system is relieved of all obligation to pay for the child's schooling. Welsch v. Department of Education, ___ Pa. Cmwlth. ____, 400 A.2d 234 (1979).

Although HEW has attempted to delineate through its regulations under what circumstances parents or various state agencies are responsible

for the costs of a residential placement, the benchmarks struck by HEW seem to erode when put to the test. In North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979), parents abandoned their child (who was epileptic, emotionally disturbed and learning disabled) and all parties agreed that as a result of all the child's various problems, he was in need of a residential placement. However, the school district took the position that it was not responsible for the cost of the residential placement because the child's educational needs could be met by attendance at a special education day center. The school district argued that residential care was necessary only because of the child's emotional problems. In dismissing the school district's contention, the court quite clearly indicated that it would not attempt to draw the lines established in the P.L. 94-142 and Section 504 regulations.

> "It may be possible in some situations to ascertain and determine whether social, emotional, medical or educational problems, are dominant and to assign responsibility for placement and treatment to the agency operating the the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the court to perform the Solomon-like task of separating them." 471 F. Supp. at 141.

The court also exhibited its dissatisfaction with the fight over financial responsibility between two state agencies, as was the case in North due to the parents abandonment of the child. In that regard, the court said:

> "It is unfortunate that the two agencies of the district having responsibility for plaintiff's care are seeking to shift the responsibility to each other--the Board of Education claiming that the plaintiff's problems are emotional, and the Department of Human Resources asserting that it will not undertake to tend to his treatment without a formal finding that the parents have neglected him. It may be that the fault lies with the antiquated state of the District of Columbia laws; in any event, it is unfortunate that the assistance of this court had to be invoked under federal statutes to resolve what essentially are internal bureaucratic disputes." 471 F. Supp. at 141.

Although conjectual, it may very well be that the dispute is between the schools and the parents rather than between two state agencies; the lines drawn by HEW will be of more significance to the courts.

C. Out-of-State Placements

There are no federal statutory or regulatory provisions specifically dealing with out-of-state placements and a similar dearth of federal case law on the subject exists. As a result, state statutes or regulations will have to be reviewed to determine when and to what extent out-of-state placements may be utilized.[13]

Absent state standards to the contrary, the silence by both Congress and HEW would appear to allow out-of-state placements and, perhaps, even compel it in certain circumstances. Both the P.L. 94-142 and Section 504 regulations prescribe that if a child is going to be removed from his or her regular class or building, the child must be educated as close as possible to home. 45 C.F.R. §121a.552(a) (3), 45 C.F.R. §84.34(a). Consequently, P.L. 94-142 may very well require a state to educate a child in an out-of-state institution which is five miles from the child's home, for example, rather than in an in-state institution which may be several hundred miles from the student's home, all else being equal.

D. Selection of Classroom or Building

At first blush it would seem that the selection of the school building in which to educate a handicapped child would not present a particular problem. The statutory and regulatory rules are straightforward and easily stated. Under P.L. 94-142 the only rule is that of mainstreaming. 20 U.S.C. §1412(5) (B). The P.L. 94-142 regulations provide three rules which are relevant to the issue: (1) handicapped children must be educated as close as possible to the child's home;[14] (2) if possible, they are to be educated in the school they would attend if not handicapped; and (3) in selecting the particular placement, potential harmful effects on the child or the quality of services must be considered. 45 C.F.R. §121a.552. However easily stated these rules may be, when disputes arise between school authorities and parents over the selection of a prticular school, the questions to be determined can be quite perplexing.

In In re Richard S, Iowa S.E.A. Decision (1979), the school district assigned an eleven-year-old severely physically disabled cerebral palsied child of normal intelligence to a normal school building in a neighboring school district. The particular building

was selected because of its almost total lack of physical barriers, allowing the child to move about in his wheelchair as independently as possible. The child's parents, however, desired to have the child educated in the school to which he would have been assigned had he not been handicapped, a building with three floors and narrow, steep stairwells. Without making significant structural changes to the building, assignment of the child to that building would necessitate the employment of an aide with sufficient strength, coordination, responsibility and sensitivity to move the child and his wheelchair throughout the building. Such a plan would also risk injury or harm to the child or others if the child were to fall while being carried up or down the stairs. Importantly, it was found that the actual educational program to be provided at either school was appropriate.

In sustaining the parents' position, the hearing officer essentially held that P.L. 94-142 and Section 504 regulations prohibits separation of a handicapped child from what would be his normal assignment solely by reason of the child's handicap.[15] It is suggested, however, that under the previously stated facts, the hearing officer erred in several respects. First, P.L. 94-142 mandates mainstreaming in general and not with respect to a specific school. In Richard S, supra, the child was attending normal classes in a normal school and was, therefore, mainstreamed. Second, by definition, "related services" are those which are "required to assist a handicapped child to benefit from education". In Richard S, the hiring of the aide is not for the purpose of supplementing the educational program, but only to make a particular building accessible. The identical educational program could be provided at another location without the need for an aide. See, Tatro v. State of Texas, 481 F. Supp. 1224 (N.D. Tex. 1979), where the court held that P.L. 94-142 does not require the school district to provide catheterization because that service was unrelated to the educational program. Third, having a child carried by an aide throughout the building not only calls more attention to the child's handicap and in a very real sense damages the child's self-image, but it obviously creates the potential for physical harm to the child, in violation of 45 C.F.R. §121a.552(d).

In comparison is Brown v. District of Columbia Board of Education, Civil Action No. 78-1646 (D.D.C. 1978). In that case, five visually and hearing-impaired children were receiving special education in a self-contained academic program in a regular school building and were integrated with non-handicapped children, to some degree, during recess, breakfast, lunch and assemblies. After an evaluation of the program, school officials determined that the children needed additional supportive services not provided in the regular school building. It was, therefore, proposed that the children be transferred to a special

school building where they could receive the additional services. The court held that such a change did not constitute a change in placement and, consequently, did not necessitate prior notice to parents. However, the court cautioned that where a change in location requires change in an individualized education program, parents do have a right to challenge the modification of the program.

Similar to Brown is In re Education Assignment of Paul P., Pennsylvania S.E.A. decision No. 114 (1978). In Paul P., parents sought to have the child (cerebral palsied with little intelligible speech) placed in regular classes in a regular building. The school district, on the other hand, offered placement in a special education center. The school district's objection to regular school placement rested upon the fact that special services were needed to enable the student to participate in a regular class and that regular buildings were generally inaccessible because of physical barriers. In rejecting the school district's contentions, the Secretary held that P.L. 94-142 specifically requires that school districts provide those services needed for educational reasons and that "it is the responsibility of the district to provide or locate an accessible building . . .." (emphasis added). The Secretary did not order placement in the particular building the child would have attended had he not been handicapped, and did not order special services for the purposes of overcoming physical barriers, as did the hearing officer in Richard S., supra.

In In re Educational Placement of Mark S., Pennsylvania S.E.A. Decision No. 34 (1979), the Secretary of Education specifically held what it inferred in Paul P. In Mark S., the Secretary concluded that hearing officers lacked the authority to assign students to particular schools, holding that such authority rested exclusively with the school district. In reaching this conclusion, the Secretary said:

> "The hearing officer's authority extends only to the 'type' of educational program which would be appropriate for the child. The school or classroom to which a child will be assigned is, therefore, we find, within the discretion of the district."

Therefore, as states and courts are grappling with the nuances of this issue, it appears that mainstreaming or least restrictive environment does not guarantee children to be placed in any particular school.

E. Disciplinary Suspensions & Expulsions of the Handicapped

Often, when specific legislation is superimposed upon the existing public school structure, fundamental conflicts result. An example of such a conflict involves the unique procedural rights enjoyed by the handicapped and the rules generally governing student discipline.

It is fair to state that across the nation, public school students who misbehave in one fashion or another are subject to appropriate discipline, such as suspension or expulsion, consistent with due process, see, e.g. Goss v. Lopez, 419 U.S. 565 (1975). However, these alternatives appear to be generally unavailable or extremely restricted with respect to the handicapped and, in some cases, the suspected handicapped.

In Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978), the school district scheduled an expulsion hearing pursuant to state law for a learning disabled child who had a history of behavioral problems. In enjoining the school district from convening the expulsion hearing, the court held that P.L. 94-142 "established procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive." 443 F. Supp. at 1242. In making this determination, the court relied principally upon the concept of least restrictive environment, saying:

> "The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children. An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placement. For example, plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the Handicapped Act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment." 443 F. Supp. at 1242-1243.

The court also relied upon the prescriptions of P.L. 94-142 that placement decisions are to be made by professional teams and that parents are entitled to participate in and to appeal placement decisions. See 45 C.F.R. §121a.533(a) (3); 45 C.F.R. §121a.345; 20 U.S.C. §1415(b) (1) (C). Expulsions by a school board, in the courts' view, would be contrary to both concepts.

The court quickly noted, however, that school districts are not powerless to deal with handicapped students who misbehave. The court cited with approval the regulations adopted under P.L. 94-142 and their comments which authorized school districts to use their "normal procedures for dealing with children who are endangering themselves or others". Stuart v. Nappi, supra, 443 F. Supp. at 1242 (emphasis added). See 42 C.F.R. §121a.513. The court stated the following:

> "Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspensions, against disruptive handicapped children. Secondly, a PPT [i.e., Planning and Placement Team] can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children."
>
> Stuart v. Nappi, supra, 443 F. Supp. at 1243.

In Luis R. v. Canzonetti, ____ F. Supp. ____ (D.C. Conn. 1979), a handicapped student was suspended for disciplinary reasons for a period of two months without a hearing. Indicating that such a suspension would violate P.L. 94-142, the court said:

> "Another factor which must be considered by school authorities in suspending or expelling a handicapped youngster is 20 U.S.C. §1415(e)(3), which prohibits any change in the child's placement pending completion of the hearing process . . .. This provision 'does not preclude a school from using its normal procedures for dealing with children who are endangering themselves or others'. 42 C.F.R. §121a.513. The idea is to permit schools to deal expeditiously with students who are dangerous or to respond to an emergency situation. Temporary suspensions or removal from class could be effected utilizing the procedures . . .. However, a permanent expulsion or change of placement would have to await completion of

the procedures prescribed by the Handicapped Act." (Slip Opinion at 17-18)

In S-1 v. Turlington, ___F. Supp. ____ (S.D. Fla. 1979), the school district expelled several handicapped students for alleged misconduct. In ordering the school district to readmit the students, the court expressly rejected the claim that a state's disciplinary procedures are totally independent of the rights of students under P.L. 94-142. The court also rejected the school district's alternative claim that P.L. 94-142 supercedes a state's disciplinary procedures only where the misconduct of the student is related to the child's handicap. In that regard, the school district unsuccessfully urged that misconduct would be related to a child's handicap only where, for example, the child is seriously emotionally disturbed, as opposed to physically handicapped. In rejecting this contention as being too simplistic and contrary to the Act's emphasis on individual treatment of the handicapped, the court noted that school boards would not have the expertise necessary to determine whether disruptive behavior was caused by the child's handicap.

However, the court's holding in Turlington was not adopted by the court in Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979). In that case the court held that a handicapped child is insulated from a school district's usual disciplinary procedures only where the disruptive behavior is related to the child's handicap. In so holding, the court said:

> "While 20 U.S.C. §1415 and its accompanying regulation (sic) do not provide for the expulsion of handicapped children, they do not prohibit the expulsion of handicapped children. While 20 U.S.C. §1412 and its accompanying regulations require schools to guarantee that handicapped students have the right to be educated, they do not require schools to guarantee that handicapped students be educated. It is the purpose of the Handicapped Act and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the student's handicap. It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the student's will to cause trouble. For an appropriately placed handicapped child, expulsion is just as available as for any other child. Between a handicapped child and any other child,

> the distinction is that, unlike any other disruptive child, before a disruptive child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt." 480 F. Supp. at 229.

The court in Doe was evidently in agreement with the court in Turlington that school boards would not have the expertise to determine whether a child's disruptive behavior was caused by the child's handicap. Therefore, the court in Doe required that the P.L. 94-142 procedures be utilized to determine the cause of the child's disruptive behavior. If it is found through the utilization of such procedures that the child's handicap is not the cause of the disruptive behavior, school boards are free to pursue the ordinary disciplinary procedures.

A question that has arisen in this area and which is likely to be raised again is when does a child's right under the handicapped laws attach so as to insulate the child from a state's disciplinary procedures. In Mrs. A. J. v. Special School District No. 1, 478 F. Supp. 418 (D. Minn. 1979), this was one of the issues raised. There, a student had repeatedly engaged in disruptive behavior over a course of months, receiving appropriate discipline. After several of these incidents, with the parents' approval, the school district initiated an evaluation process to determine whether the child was handicapped. After the evaluation process was instituted, but prior to its conclusion, the student was involved in a fight with another child and was suspended for fifteen days. The parents argued that the child was protected from the suspension on the basis of P.L. 94-142 and its regulations. In rejecting the parents' contention, the court held that P.L. 94-142 applied only to those children that have been properly evaluated and identified as handicapped. In discounting the parents' claim that since the school district suspected the child to be handicapped, as evidenced by the evaluation process, the protections of P.L. 94-142 attached, the court said:

> "[S]schools are under a clear obligation to make the classification decisions through an exclusive formal process with the input of parent and child. The plaintiff's argument is simply incongruous, as to accept the plaintiff's assumption that school officials should have treated A.J. as a handicapped student based on the suspicions of the school officials would require the defendent to ignore and even violate federal and state law

concerning the classification or identification decision of a child as handicapped and in need of special services."

Mrs. A.J. v. Special School District No. 1, supra, 478 F. Supp. at 432.

This issue, unfortunately, is not as clear as it appears to be in Mrs. A. J. A good number of states are subject to court orders which, if not inconsistent with P.L. 94-142 in some areas, are different. For example, in Lebanks v. Spears, 60 F. R. D. 135 (E.D. La. 1973), the court's order provided that any child who was a disciplinary problem and who was "suspected" of possible retardation was entitled to special hearing rights. Similarly, in Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), the consent decree prohibited students "thought by any school official" to be mentally retarded from being subjected to a change in educational status. See also, Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972). Therefore, where a child is merely suspected of being handicapped, in some states at least, the extensive procedural and substantive rights of the handicapped may have to be recognized.

Despite the existence of some half dozen federal court decisions which ostensibly prohibit traditional disciplinary measures from being applied to the handicapped, except in emergency situations, it is nonetheless suggested that where it is obvious that a handicapped student's misbehavior is unrelated to the child's handicap that school officials can deal with the child as it would any other. To consider an extreme case, a blind child who is selling marijuana on school grounds should be able to be appropriately disciplined outside of the unique procedures which were established by P.L. 94-142. The student's exceptionality should not serve to insulate the student from the traditional disciplinary procedures.

It is anticipated that the tough questions that will have to be answered by the courts and which I do not believe have yet been answered involve those situations where handicapped children have been improperly placed in regular classrooms, and while not endangering themselves or others in the context understood by the courts in Stuart and Louis R., they are seriously disrupting on a daily basis the educational program being offered to the other children in the class. It would seem that a school district's utilization of the unquestionably slow placement procedures of P.L. 94-142 would seriously harm, from an educational standpoint, those other students, and it would seem that school officials

would be ill-advised to maintain the student in the classroom pending the outcome of such proceedings. But there appears to be risks to school officials, in view of the court's decisions already discussed, if they should remove the handicapped child from the normal room.

Perhaps a way of resolving the problem is to provide for automatic alterations in the educational program in both the state standards applicable to the handicapped and in the I.E.P.'s of each handicapped child. In other words, incorporated in the plan for each student, either expressly or through the incorporation of relevant state standards, could be placement directives to take effect should certain conduct be exhibited by the child. Analogous to a handicapped child who is automatically promoted to a higher level after mastering certain skills, a handicapped child who regresses in terms of behavior should properly be subject to an appropriate modification. This writer is unaware of this type of an approach ever having been attempted, but it may provide a vehicle by which states and school districts can avoid situations like Stuart.

IV. CONCLUSION

Despite the tens of thousands of handicapped students that have been placed since the effective date of P.L. 94-142, this area of the law is in its infancy. There is not one circuit court decision involving educational placement under P.L. 94-142 or Section 504. It will be interesting to observe whether and to what extent the district courts are affirmed in this area. In the meantime, where states and school districts must pay attention to increased costs, it is suggested that they ought to be stressing the concept of local control and downplay the notion of maximization.

APPENDIX

[1] O.W. Holmes, The Path of the Law, Collected Legal Papers, 167, 173 (1920).

[2] The discussion contained in this paper will focus primarily on P.L. 94-142. Because Section 504 and the regulations adopted thereunder deal exclusively with the elimination of discrimination, their specific mandates are largely fact dependent and are likely to vary from state to state. Generally, the more educational services provided to the non-handicapped, the more that must be provided to the handicapped under Section 504. Where that Section or its regulations have some bearing upon the issues herein discussed, their relevance will be noted.

[3] The regulations promulgated under Section 504, on the other hand, define a free appropriate public education somewhat differently and in the context of the quality of educational opportunity provided by each state or school district. The language of the regulation is as follows:

> "For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and service that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §84.34, 84.35, 84.36 (relating to due process hearing)." 45 C.F.R. §84.33(b).

[4] One court, possibly inadvertently, said that "[t]he act [i.e., P.L. 94-142] does not define appropriate education". Rowley v. Hendrick Hudson Central School District, 483 F. Supp. 528 (S.D. N.Y. 1980).

[5] In Mahoney v. Administrative School District No. 1, ___ Cal. App. ___, 601 P.2d 826 (1979), the court said that "the programmatic provisions of the Act are open-ended and much definition is left to the states. * * * [I]t may be the case that Congress intended to leave the definition of 'appropriate' education sufficiently loose to enable local legislative and school officials to make appropriate programmatic decisions and to adapt those decisions to individual cases." Id. at 829.

6 The legislative history is replete with evidence that Congress has traditionally been committed to the preservation of local control over public education. For exmple, this committment was expressed in 1965 by Congress as follows:

> "It is the intention of the proposed legislation [i.e., the Elementary and Secondary Education Act, P.L. 89-750, one of the procursors to P.L. 94-142] not to prescribe the specific types of programs or projects that will be required in school districts. Rather such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from state to state and district to district. * * * There may be circumstances where . . . the best approach in meeting the needs of educationally deprived children would be to up-grade the regular programs." 1965 U.S. Code, Cong. & Admin. News 89th Congress, p. 1454.

Similarly, in a House Report in the 1966 Amendments to the Education and Secondary Education Act, the committee expressed its "gratitude" to find that "flexibility and local discretion is a keynote in the administration of" the Education Act. 1966 U.S. Code, Cong. & Admin. News. p. 3863.

7 In Milliken v. Bradley, 418 U.S. 712, 741-742 (1974) (relating to inter-district remedying of segregation), the court said:

> "No single tradition in public education is more deeply rooted than local control over the operation of school; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process. See Wright v. Council of the City of Emporia, 407 U.S. 451, 469. Thus, in San Antonio School District v. Rodriguez, 411 U.S. 1, 20, we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs and encourages 'experimentation, innovation, and a healthy competition for educational excellence'."

See also San Antonio School District v. Rodriguez, 411 U.S. 1, 49-50 (1973).

[8] In San Antonio Independent School District v. Rodriguez, supra, the Texas school financing system survived an equal protection attack because it provided "each child with an opportunity to acquire the basic minimal skills" even though it created an environment in which some students benefitted more than others. In Frederick v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976), the court held that an equal protection claim was stated because the plaintiffs alleged that they could not "derive any educational benefits" from the program they were being provided. Id. at 835 (emphasis in original) In Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975), the court held that an equal protection claim was stated when the plaintiffs alleged "that their children are being denied educational opportunities," noting that "there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education." Id. at 958. Similarly, in New York State Association for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1973), the court noted that "a state is not constitutionally required to provide the mentally retarded with a certain level of special education." Id. at 763. In Sherer v. Waier, 457 F. Supp. 1039 (W.D. Mo. 1977), a motion to dismiss by the defendents was sustained because "the complaint [did] not allege that the defendents have denied plaintiff Kimber Sherer any education, but rather that defendents have refused to provide special services to her . . . .." Id. at 1047-1048. In Doe v. Koger, 480 F. Supp. 225 (N.D. Ind. 1979), the court said that "[t]he equal protection clause does not require a state to guarantee more education to students with a greater need of education." Id. at 230. Finally, in Mills v. Board of Education of the District of Columbia, 248 F. Supp. 866 (D.D.C. 1972), the court held that if insufficient funds were available to fund optimally both regular and special education programs, equal protection simply prohibited states from burdening the handicapped with a disproportionate share of the cutbacks.

[9] In Senate Report No. 94-168, it was noted that P.L. 94-142 was enacted in the belief "that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." 1975 U.S. Code, Cong. & Admin. News, 94th Congress, p. 1433. That Senate Report also stated that P.L. 94-142 was developed because Congress "recognizes the states' primary responsibility to uphold the Constitution of the United States and their own state constitution and state laws as well as Congress' own responsibility under the Fourteenth Amendment to assure equal protection of the law." Id. at 1446. Further support for the constitutional foundation of P.L. 94-142 is found in the report's discussion of discriminatory treatment, wherein it was said that: "it is this [unconstitutional] discriminatory treatment and exlusion which court cases, state and federal laws are designed to remedy." Id. at 1451.

[10] As was noted in Ex Parte Virginia, 100 U.S. 339 (1879), "Congress is authorized to enforce the prohibitions [of the Fourteenth Amendment] by appropriate legislation. Some legislation is contemplated to make the amendments [to the constitution] fully effective." See also, Katzenbach v. Morgan, 384 U.S. 641 (1966), where the court held that the Voting Rights Act of 1965 was enacted to enforce the Fourteenth Amendment.

[11] Senate Report No. 94-148, clearly states: "[t]he committee recognized that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome," 1975 U.S. Code, Cong. & Admin. News, 94th Congress, p. 1435. Such was the intentional design of Congress, as all language to the contrary was stricken from the bill. "The committee had deleted the language of the bill as introduced which required objective criterion and evaluation procedures by which to assure that the short term instructional goals were met." Id. at 1436. Congress further refused to mandate pre-school education to the handicapped, 20 U.S.C. §1412(a)(B), despite its recognition that maximizing educational benefits, especially with reference to the handicapped, requires pre-school education.

> "The committee heard testimony which indicated strongly that special education services provided to handicapped children before 'normal' school age were often the most beneficial, since much more could be done at an early age to ameliorate, alter or develop skills to compensate for certain handicapping conditions." Id. at 1479.

If it were Congress' purpose to maximize results, or indeed to mandate any specific end result of special education, it could have easily expressed that intent as it did in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000, et. seq., which provides, inter alia, that:

> "The treatment, services and habilitation for a person with developmental disabilities should be designed to maximize the development or potential of the person . . .." 42 U.S.C. §6010(2).

Lastly, consistent with the thought that a certain level of achievement or advancement was in no way guaranteed by the statute or regulations, the Department of Health, Education and Welfare (HEW), in its regulations administering educational programs for the handicapped, expressly provided that "no agency, teacher or other person may be held accountable if a child does not achieve the growth projected in

the annual goals and objectives." 45 C.F.R. §212(a) 349.

[12] Armstrong is currently pending before the Circuit Court of Appeals for the Third Circuit. Oral argument was held in January, 1980.

[13] See, 22 Pa. Code §13.12.

[14] In In re the Education of Assignment of Elliot S., Appeal Opinion No. 86 (Secretary of Education, Commonwealth of Pennsylvania, 1978), the Secretary of Education held that closeness to home is only one factor among many to consider and that as between two schools, when an appropriate program cannot be provided at the closer school, the concept is irrelevant.

[15] The presiding officer's conclusion that Section 504 prohibits different treatment of an individual solely by reason of handicap is somewhat at odds with the court's holding in Southeastern Community College v. Davis, ____ U.S. _____, 99 S.Ct. 2361 (1979), wherein it was held that if a particular handicap renders an individual unqualified for a particular program, then that individual may be excluded for that reason alone.

DISCIPLINING THE HANDICAPPED STUDENT

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INTRODUCTION

Mike is 15. He is in the 10th grade of the regular public high school. His hearing is impaired. During a crackdown on drugs on campus, Mike and three others were found to be selling marijuana. The penalty for selling marijuana in the school district is expulsion. All four students were accordingly expelled. Mike admitted he sold marijuana; however, he claimed that since he was handicapped, his educational placement could not be changed without a full placement hearing where the only relevant issue would be whether an alternative placement would meet the educational needs of the child. In short, he argued that the board could not discipline him for selling marijuana because of his handicap. Will he prevail? The incident is hypothetical but the question is occurring with increasing frequency as school districts and handicapped students gain experience under the Education for the Handicapped Act, Public Law 94-142.[1]

GOSS v. LOPEZ[2]

The problem arises because of a potential conflict between the due process rights guaranteed to all school children established by Goss v. Lopez and the elaborate procedural protections afforded handicapped students under federal and state law.

The Goss case involved students who were suspended from school for ten days without a hearing. They alleged this suspension abridged their constitutional right to an education as provided by Ohio law without due process.

The court found the ten-day suspension violated a liberty and property interest substantial enough to warrant constitutional protection. It then proceeded to define what is required before a school district may suspend a student. The minimal procedure identified by the Supreme Court was:

> "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."[3]

The court further allowed for removal without a hearing in emergency situations and called for more formal procedures for longer suspensions or expulsions.

It is important to note that the focus of the disciplinary due process hearing is whether the student is guilty of what he is alleged to have done and not whether the school district has authority to discipline the child through the use of suspensions or expulsions. There is no question that a school district has such authority.

STUART v. NAPPI[4]

By contrast when the allegedly disruptive student is handicapped, a wholly different set of questions is raised. The first reported case to consider this issue was Stuart v. Nappi, an action for injunctive relief.

Kathy Stuart, the plaintiff, was in the third year of high school. Her records indicated a history of learning disabilities, limited intelligence, and behavioral problems. Kathy had been placed in a special education program for the 1975-76 school year. Late that year after she stopped attending classes, a meeting was requested to determine if a change in placement was appropriate. That meeting was not held.

For the 1976-77 school year Kathy was assigned part-time to a learning disability program. Her attendance rapidly declined and, by late fall, she was wandering the halls with friends. In December she was involved in a number of incidents which required disciplinary action. Following conferences to discuss her conduct with her mother, her attendance improved and at the March placement conference it was concluded that she should remain in her present placement for the remainder of the year. The placement team further recommended that she be scheduled for daily special education classes and special education vocational training in the fall.

However, in September 1977, Kathy did not attend the recommended program. On September 14 she was involved in a school-wide disturbance and suspended with the recommendation that she be expelled for the remainder of the school year. A disciplinary hearing was scheduled in November; however, Kathy's counsel sought an injunction to prohibit the disciplinary hearing and requested a placement conference. Counsel took the position that regardless of what she may have done, Kathy was entitled to a review of her educational placement under the Handicapped Education Act and could not be expelled.

The court concurred. First, it determined that Kathy had a right under the Handicapped Act to "an appropriate education." Since the school system had not followed its own recommendation that Kathy be placed in a learning disability program, her right had been violated.

Secondly, Kathy claimed a right to remain in her present placement until resolution of her special education complaint. Her claim was based on the statutory language which provides:

"During the pendency of any proceedings conducted pursuant to this section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . until all such proceedings have been completed."[5]

The court recognized a potential conflict between this protection afforded the handicapped child and other statutory proceedings designed for discipline. However, the court found the potential conflict resolved by the regulations which state that if a complaint pertaining to placement is pending, placement may not be changed; provided that,

"this does not preclude a school from using its normal procedures for dealing with children who are endangering themselves and others."[6]

The court construed this language to mean that a district could use its regular procedures to deal with an emergency, but could not expel a handicapped child while a special education complaint was pending. Under the court's analysis, a limited suspension to protect the child or others would be acceptable, but not an expulsion.

Next, plaintiff claimed that she could not be expelled even after resolution of her special education complaint, because an expulsion was contrary to the mandate of the Education for the Handicapped Act which requires that handicapped children be educated in the "least restrictive environment."[7] Again the court agreed, finding that the Act prescribes a procedure to place the disruptive child in a more restrictive environment based on the assessment of a professional team. This procedure in essence preempts the disciplinary procedure for the handicapped youngster.

The court concluded that its decision adequately protected the school board's interest in maintaining discipline by giving it the short-term solution of suspending a disruptive handicapped child and the long-term remedy of changing the student's special education placement through the appropriate special education procedures.

CASAS SINCE STUART

Is this a workable rule? Since the Stuart decision several other jurisdictions have wrestled with similar cases with limited satisfaction. A review of those decisions will help define the problems of a strict application of the Stuart rule that handicapped students can never be disciplined through normal suspension - expulsion proceedings.

In Florida, for example, seven educable mentally retarded (EMR) students filed suit for injunctive relief when they were expelled from

high school for alleged misconduct.[8] They requested an impartial due process hearing under the Handicapped Act.[9] The school district took the position that plaintiffs received the procedural protections for disciplinary action required by Goss v. Lopez, supra, and were not entitled to the protections of the Handicapped Act during their expulsions. The school district further conceded that a handicapped student could not be expelled for misconduct resulting from the handicap itself, but because the plaintiffs were not diagnosed as "seriously emotionally disturbed", their handicap was unrelated to their misconduct.

The court disagreed. While not ruling out the possibility of expelling a handicapped child if his misconduct was not the result of his handicap, the court found that in the present litigation no adequate determination of that issue had been made. Relying on Stuart v. Nappi, supra, the court said:

> "Evaluations and placement decisions must be made by a specialized, knowledgeable group of persons. 45 C.F.R. Section 121a. 532(3), 533(a)(3). In the view of this court, only such a trained, specialized group is capable of making the determination of whether the student's handicap bears a causal relationship to his misconduct."

In short the school district was enjoined from taking disciplinary action against these students. Since they were handicapped, a change in placement required a due process conference to determine what would be an appropriate educational placement, not whether their misconduct warranted expulsion. This case is currently on appeal.

Meanwhile, a Minnesota plaintiff sought to extend this rationale one step further. In Mrs. A. J. v. Special School District No. 1,[10] K. J., an eighth grader, was given a 15-day suspension following a fight in art class. At the time of her suspension, however, K. J. was subject to an on-going formal educational assessment which as defined in Minnesota law could lead to a special educational placement.[11] Based on this fact plaintiff argued that K.J. was entitled to the protections of the Handicapped Act; that is, that once the evaluation and assessment procedures were commenced, the student received all the rights afforded a handicapped child.

The court refused to accept this argument. While the school district had begun the process to determine whether K.J. was handicapped, the court found that that determination had not been made. Instead, the court concluded that for the district to treat K.J. as a handicapped student based on the mere suspicions of school officials would violate the detailed protections given students under the Handicapped Act.

Furthermore, since K.J. was merely suspended and not expelled, her educational placement was not changed and plaintiff's reliance on Stuart v. Nappi was misplaced. This court thereby drew a line. Students who are in the process of being assessed to determine whether they are handicapped and who are merely suspended are not entitled to the Handicapped Act protections, at least in Minnesota.

The Supreme Court of Iowa has also considered the relationship between the rights of handicapped children and the responsibilities of school districts for discipline. In Southeast Warren Community School District v. Department of Public Instruction,[12] Thomas Konrad, a special education student, was expelled. In an administrative proceeding his mother appealed, and the Deaprtment of Public Instruction ruled that handicapped children could not be expelled under any circumstances. The school district took that decision to court where it was reversed, and the mother appealed.

In the Supreme Court, the Department of Public Instruction advanced two theories to support its position that a special education student could not be expelled. The first was premised on state law, the argument being that the specific provision mandating special education for handicapped children[13] was unreconcilable with the sections permitting expulsion under appropriate circumstances.[14]

The Supreme Court found no conflict. The Court determined that the intent of the special education legislation was to provide equal educational opportunity for the handicapped student, not to limit the right to expel. Even after passage of the special education law, a school district retained the right to deny admission to "any child whose presence in school may be injurious to the health or morals of other pupils or to the welfare of such schools."[15]

Secondly, the Department of Public Instruction argued that special education students could not be expelled because state (and federal) law requires that they be placed in the least restrictive environment consistent with their handicaps. Relying on Stuart, the Department contended that the law required that disruptive behavior calls for a review of the educational placement and possibly a transfer to a more restrictive environment, but not expulsion.

The Iowa Supreme Court agreed with much of the reasoning, but not the conclusion. The Court found that the statutory protections afforded handicapped students required a re-evaluation of the child by the diagnostic-educational team. Based on the team's recommendation to the board, expulsion would be permitted "only when no reasonable alternative placement is available." Therefore, in Iowa a special education student may be expelled, but only if the child's placement is re-evaluated in terms of his educational needs before the disciplinary decision is made.

The New York Commissioner of Education also has reviewed the expulsion question. In Re John H. Cobb,[16] the school district sought to suspend a nine-year old boy for six months for kicking two other children and his reading teacher and disrupting the class. The child's parents contested the suspension, and in a stipulation the parties agreed to evaluate John for possible special education placement and to reconsider the discipline. Following a second suspension hearing, the board's decision was reaffirmed, and the youngster was suspended for the rest of the school year, or until he might be placed in special education.

The parents appealed. The Commissioner found on the facts that John's conduct endangered other children and disrupted the class. Therefore, under the federal regulations that permit the removal of such a handicapped child,[17] the disciplinary suspension was affirmed. The Commissioner carefully distinguished this action from a change in educational placement, recognizing that, if a change in placement is challenged, the child is permitted to stay in his current status pending resolution of the issue, and a suspension in that context would not be proper. The Commissioner further noted that his decision did not answer the question of John's proper placement. The evaluation and placement procedure was still in process. When completed, the suspension would terminate. In sum, the suspension did not interfere with or circumvent the placement procedure, so the child's rights were fully protected.

Since John was not classified as handicapped before the disciplinary action was taken, this case is readily distinguished from Stuart. Had the child been previously determined to require special education, Stuart would have required a review by the trained placement team to determine whether the misconduct was related to the handicap before a lengthy suspension could be imposed.

Although the Commissioner relied on the adverse affects John's continued presence in class would have on the welfare of others to support his decision to permit the suspension, the result in this case is consistent with the Minnesota ruling that a child who is in the process of being classified as handicapped is in a different posture than the handicapped child. Taken together these two cases indicate a trend that permits and, in fact, requires a school district to distinguish between the child who is handicapped and the child who is merely in the classification process. If the suspended child is ultimately diagnosed as handicapped, he is readmitted at that time in a special education placement. If he is classified as non-handicapped, he must serve out the suspension.

Finally in Doe v. Koger[18] the Northern District Court in Indiana recognized the principle that a handicapped child could be disciplined under the same procedures as a normal child provided the child's misconduct was not causally related to his handicap. Here, the plaintiff was mildly mentally handicapped. He was suspended and expelled for disciplinary

reasons. He appealed and requested a placement hearing under the state regulations.

The court reviewed the Handicapped Act and concluded that it was the intent of Congress in enacting the law "to prohibit districts from expelling students whose handicaps cause them to be disruptive."[19] But the court did not terminate its analysis there. Rather, it distinguished the case of the child whose handicap causes him to be disruptive from the handicapped child who is disruptive for other reasons. In the latter case, the school may discipline the child:

> "It is the purpose of the Handicapped Act and its accompanying regulations to provide handicapped students placement which will guarantee their education despite the students' handicap. It is not the purpose of the Handicapped Act to provide handicapped students placement which will guarantee their education despite the students' will to cause trouble."[20]

The court held that the placement procedures of the Handicapped Act should be used to determine whether the student's misconduct was caused by his handicap. When that is the case, the child's placement may be adjusted if a more appropriate assignment is required. However, if the original placement is appropriate, the child may be expelled according to regular procedures.

This case is interesting also because it discusses the constitutional equal protection claim that a handicapped child is being denied his right to an education if he is expelled. The court found no fundamental right at issue and no unequal treatment. Since both handicapped and non-handicapped students were treated the same under the disciplinary procedures, there could be no invidious discrimination. The equal protection clause does not require that a particular class receive superior treatment, but only that they be treated the same.

LEARNING FROM THE PRECEDENTS

What do all of these cases tell a school district about how it should handle the discipline of handicapped youngsters?

First, the protections found in the Handicapped Act do not attach until the classification process is completed.[21] However, one question remains unanswered even in this threshhold area. Must the district continue the evaluation process if the child is expelled in those districts where expulsion normally terminates all obligation of the district for the student? The rationale for continuing the process is to avoid denying the handicapped child the rights the Act was designed to protect. The rationale for stopping the process was articulated in the Minnesota case, namely that the mere suspicions of school officials do not warrant treating one child differently from another. It might be noted here that in the Florida case a similar

question arose. There the students challenged their expulsion as a change in educational placement after the expulsion had occurred, and the school district responded that since they were expelled they had no right to challenge the placement. The court avoided deciding the issue but impliedly took the position that even an expelled handicapped child could challenge the change in placement.

Second, deference must be given the procedures found in the Handicapped Act if the misconduct is related to the handicap. That is, discipline of a handicapped student is a two-step process. First the professional team must decide if there is a causal relationship between the misconduct and the disability. If there is no relationship, discipline can be imposed. In some jurisdictions, Indiana, for example, expulsion may be permitted. In others, like Connecticut, the handicapped student presumably may be punished but the penalty cannot include a change in placement unless that assessment is based on the child's educational needs, rather than discipline alone.

Third, if the student's misconduct is related to the handicap, all jurisdicitions agree that the special education proceedings preempt the disciplinary procedures. The child may not be suspended or expelled unless that placement is determined by a team of experts to be the least restrictive assignment appropriate to his educational needs.[22]

And fourth, a handicapped child may be removed from class if his presence endangers himself or others. This removal, however, must be brief; for as soon as the danger is past, there is no reason for the child's absence. If the handicapped child represents an on-going threat, the remedy is a more restrictive placement, not a disciplinary expulsion.

CONCLUSION

Returning to the question raised at the beginning of this paper, what will happen to Mike? Can a school district expel a hearing-impaired student who admits to selling marijuana? Stuart would hold no. Expulsion is not the least restrictive environment appropriate to Mike's educational needs, at least not in a narrow reading of the law. But is this result consistent with the broader intent of the legislature to require that handicapped students be placed with, and presumably treated like, their non-handicapped classmates as much as their handicap allows?[23] Should a double standard for classroom conduct be required simply because a child is handicapped?

It appears that the Stuart holding is too broad. The decision reached in Indiana is wiser. In those jurisdictions Mike may be expelled if a placement team first determines that his hearing limitations played no causal role in the fact that he was selling marijuana. The mere fact that Mike is handicapped cannot excuse his failure to conform to the code of conduct in the school district.

Should this two-step approach be required? Did the Florida school district, in fact, advance the better view; namely that, since the child's assessed handicap was not a behavioral problem, his behavior should be regulated like that of every other student? At what point is it in the best interest of all parties that the handicapped child be required to adjust to the school district, rather than the district to the handicapped child? It seems that the area of discipline is the place to begin.

1 20 U.S.C. Section 1401 et seq.

2 419 U.S. 565 (1975).

3 Id. at 581.

4 443 F. Supp. 1235 (D. Conn. 1978).

5 20 U.S.C. Section 1415(e)(3).

6 42 C.F.R. Section 121a.513.

7 20 U.S.C. Section 1415(5)(B); 45 C.F.R. Section 121a.551.

8 S-1, et al. v. Turlington, et al., ____ F. Supp. ____ (S.D. Fla. 1979).

9 20 U.S.C. Section 1415(b)(1),(2).

10 478 F. Supp. 418 (D. Minn. 1979).

11 5 MCAR EDU 120A.12

12 Case No. 231/63181 (S.Ct. Iowa, 11/14/79)

13 Section 282.3(1), Code of Iowa, 1979.

14 Section 282.4, Code of Iowa, 1979.

15 Section 282.3(1), Code of Iowa, 1979.

16 New York SEA Decision No. 10053 (August, 1979).

17 45 C.F.R. Section 121a.513.

18 480 F. Supp. 225 (N.D. Ind. 1979).

19 Id, at 228.

20 Id, at 229.

21 But see Lebanks v. Spears, 60 F.R.D. 135 (E.D. La, 1973).

22 See also the consent decrees entered in P-1 v. Shedd, ____ F. Supp. ____ (D. Conn. 1979), 3 EHLR at 551.164 and Mattie T. v. Holloday, ____ F. Supp. ____ (N.D. Miss. 1978), 3 EHLR at 551.109.

23 20 U.S.C. Section 1412(5)(B); 45 C.F.R. Section 121a.551(b)(1).

LIABILITY FOR WRONGFUL IDENTIFICATION, EVALUATION OR PLACEMENT - IS THERE MALPRACTICE?

By: Edward W. Remsburg
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"Education" and "malpractice" are terms with which we are all quite familiar. Used separately, their meanings are fairly well-defined. In the past several years, however, these two terms have been wedded to form an unfamiliar but growing body of law known as educational malpractice. Only four short years ago it was said that "There is virtually no law in this area."[1] Yet today there exists an unmistakable chain of litigation concerning alleged educational malpractice. Although to date the scoreboard is fairly one-sided, this string of educational malpractice cases could well mark the beginning of a serious area of litigation in public education. And special education issues involving identification, evaluation and placement will undoubtedly be on the cutting edge of this developing area of the law.

REVISITING AN OLD ACQUAINTANCE - NEGLIGENCE

The establishment of a cause of action in educational malpractice is no different from any other negligence claim. The following elements of the traditional formula must be satisfied:

1. A duty or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against reasonable risk.

2. A failure on the part of the actor to conform to the standard required. Both the first and second elements of the formula must go together, because an actor's conduct may fall below an accepted standard but is not liable if he has no recognized duty to the plaintiff.

3. A reasonably close causal connection between the conduct of the actor, or defendant, and the resulting injury to the

plaintiff, commonly known as 'legal cause' or 'proximate cause.'

4. Actual loss or damage resulting to the interests of the plaintiff. Threat of future harm is not enough.[2]

The rules for burden of proof in a negligence case, whether the court or jury finds the facts, are as follows:

The plaintiff has the burden of proving:

a. Facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by the law for the plaintiff,

b. Failure of the defendant to conform to the standard of conduct,

c. That such failure is a legal cause of the harm suffered by the plaintiff, and

d. That the plaintiff has in fact suffered harm of a kind legally compensable by damages.[3]

The proof of these traditional elements of negligence has caused several stumbling blocks to plaintiffs in their attempts to establish a case of educational malpractice. Before reviewing the educational malpractice cases, however, it is important to examine the classification process for handicapped students. As discussed more fully below, the classification process presents unique problems which may give rise to claims of educational malpractice.

IDENTIFICATION, EVALUATION AND PLACEMENT PROCESS

The Education for Handicapped Children Act of 1975[4] (the Act) has had a great impact on the classification process of handicapped children and the related duties of the state educational systems. In passing the Act, Congress expressed a strong concern for the problems of the unidentified educationally handicapped and the establishment of classification and evaluation procedures.[5]

In the Act, at 20 U.S.C. § 1412(2)(c), Congress placed upon each participating state and local educational agency a general duty to identify, locate

and evaluate every child in need of special education. Individualized education programs for each such child must be established pursuant to an evaluation.[6] A staffing team, composed of (1) a representative of the public agency, other than the child's teacher, who is qualified to provide or supervise the provision of special education, (2) the child's teacher, (3) one or both of the child's parents, (4) the child, where appropriate, and (5) other individuals at the discretion of the parent or agency, is charged with the responsibility of developing, reviewing, and revising a handicapped child's individualized education program. Annual reviews of each child's evaluation and placement must be conducted.[7] Further explication of the evaluation and placement requirements is left to the state educational agencies which, in order to qualify for federal funding, must submit their special education plans to the federal education commissioner to guarantee conformity with the federal legislation and regulations.[8]

For example, in Iowa the explication of the evaluation and placement requirements can be found in the Rules of Special Education issued by the Department of Public Instruction.[9] Even here, however, the rules only generally describe the process a student must pass through before a program is provided, since wide discretion is delegated to the area education agencies in Iowa. These agencies are responsible for formulating written procedures to determine the eligibility and placement of children in appropriate special education programs. These procedures must include, however, the use of "diagnostic-educational teams" to compile and analyze relevant data about each child considered, and to recommend decisions regarding a child's evaluation and placement. The diagnostic-educational team, generally called a "staffing", is perhaps the most crucial link in the procedural chain establishing a special education program for handicapped children, for it is at this point that education professionals review the information gathered about a child's special needs and formulate the individualized education plan in an effort to guarantee the most appropriate placement possible. All reevaluations, including special reevaluations requested by parents or school personnel, are conducted by the diagnostic-educational team which is responsible for recommending in writing either a continuance of the present placement, transfer to another program, or dismissal from special education with appropriate follow-up measures.

The problem areas in the identification, evaluation and placement process are numerous. First, there is a possibility that the process will result in an overrestrictive classification. For example, a student who presents a discipline problem may be mistakenly classified as having a handicap requiring special education.[10] Additionally, a student who requires some special education may be diagnosed as having a problem more

severe than it actually is. In either situation the classification of the student would be faulty and would result in an overrestrictive classroom environment.

Secondly, the classification process may result in the failure to identify the seriousness of the student's handicap. A student in a regular class may have a handicap but still be ignored if he is not a discipline problem. The teacher may simply consider him a poor student without any particular handicap.[11] Additionally, a student in need of special education may remain in an inadequate special program because his handicap is regarded to be less serious than it really is. Again, in either case, the classification of the student would be faulty.

Finally, even if a handicapped student is properly identified, he still may receive an improper classroom placement. Such a case could arise where a disagreement exists between the parents and school district over the extent to which the handicapped student is to be mainstreamed. A similar problem could arise where a school district has one special education program in which it seeks to place a student when an arguably more appropriate placement may exist in another school district or in a private school. In either case the appropriateness of the particular special education program into which the school places the student would be in question.

In each of these potential problem areas - misclassification of the exceptional child or subsequent wrongful placement - the possibility of an educational malpractice claim exists. However, as is indicated by the following review of education malpractice cases, the bridge between a potential claim and its actual proof has rarely been crossed.

A REVIEW OF THE CASES

The chain of litigation concerning alleged educational malpractice began with the case of Peter W. v. San Francisco Unified School District.[12] In Peter W., a poorly educated student alleged negligence on the part of the school district with respect to his education in the following particulars:

> Defedendant School District, its agents and employees negligently failed to use reasonable care in the discharge of its duties to provide plaintiff with adequate instruction, guidance, counseling and/or supervision in basic academic skills and failed to exercise that degree of professional skill required of an ordinary prudent educator under the same circumstances as exemplified, but not limited to the following acts:

1. Negligently and carelessly failed to take notice of plaintiff's reading disabilities . . . .

2. Negligently and carelessly assigned plaintiff to classes where the books and other materials were too difficult for a student of plaintiff's reading ability to read . . . .

3. Negligently and carelessly allowed plaintiff to pass and advance from a course or grade level although the defendants knew or with the exercise of reasonable care and skill should have known that plaintiff had not achieved the knowledge, understanding, or skills required for completion of said course or grade level and necessary for him to succeed or benefit from subsequent courses. . . .

4. Negligently and carelessly assigned plaintiff to classes with instructors not qualified or unable to teach the particular subject, and classes not geared towards students with his reading abilities and disabilities . . . .

5. Negligently and carelessly permitted plaintiff to graduate from high school although he was unable to read above the eighth grade level . . . . [13]

Additionally, the plaintiff alleged the tort of misrepresentation, claiming that the defendants fraudulently represented to plaintiff's parents that plaintiff was performing at grade level in reading, writing and other basic skills. On proper motion the trial court dismissed the complaint for failure to state a cause of action. An appeal followed.

The appellate court focused upon the inadequacy of the complaint in alleging the first element in the traditional formula for negligence - the school district's duty of care. The plaintiff argued that the district's duty of care was based on three theories: (1) the assumption of the function of instruction of students imposes the duty to exercise reasonable

care in its discharge; (2) there is a special relationship between students and teachers which supports the teachers' duty to exercise reasonable care; and (3) teachers have a duty to exercise reasonable care in instruction and supervision of students, as recognized in decisions holding that public school authorities have a duty to exercise reasonable care for the physical safety of students under their supervision.

The appellate court acknowledged that in common parlance every educator has a duty of care to every student. However, the court further opined that this did not satisfy the technical requirements of "duty of care" in tort litigation. The court emphasized that applications of "duty of care" to novel situations turn to a great extent upon questions of public policy, including such considerations as:

> [t]he social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; . . . in the case of a public agency defendant, the extent of its powers, the role imposed upon it by the law and the limitations imposed upon it by budget.[14]

In declining to extend a duty of care to the academic educational situation, the court stated the following:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might - and commonly does - have his own emphatic views on the subject.[15]

The California appellate court additionally found that many factors outside the control of the school district could influence a student's progress in school. In such a situation, the court opined that there is no workable rule of care against which the district's alleged misconduct could be measured. Thus, there is no reasonable certainty within the meaning of tort law that the student suffered injury as a consequence of any behavior of the school district. Finally, the court noted that the schools today are the object of controversy, public debate, and dissatisfaction. To hold the schools to an actionable duty of care in the discharge of academic functions would expose them to countless numbers of tort claims of disaffected students and parents.[16]

This precedent-setting California case was cited shortly thereafter in an Iowa educational malpractice case entitled Beaman v. Des Moines Area Community College.[17] The Beaman case was brought by students who were enrolled in a telecommunications program offered in a community college. The students contended that the college had failed to comply with certain alleged standards and guidelines pertaining to the course instructor and classroom equipment. The Iowa court addressed this "novel legal question" of educational malpractice by refusing to explicitly expand the concept of negligence to include "complaints arising from the area of academic education." The court, in relying on Peter W. v. San Francisco Unified School District, refused to recognize a duty of care from the school to the students and accordingly sustained a motion to dismiss.

The next educational malpractice case arose in Florida. In Garrett v. School Board of Broward County, No. 77-8703 17th Judicial Cir. (Florida, Dec. 5, 1977), the court dismissed (with leave to amend) a complaint sounding in educational malpractice. The complaint stated that the student was in twelfth grade and scheduled to graduate in June 1977, although "functioning at approximately the fourth grade level in english, and the second to third grade level in math." It was further alleged that the plaintiffs were never informed that an evaluation at the end of the student's third year of school revealed that the student "should be given an opportunity to see what she can accomplish over a period of time enrolled in a clinically oriented day school with individual instruction . . . . " Finally, the complaint alleged that the employees of the school resisted the efforts of the parents to secure an appropriate placement for their daughter, concluding that the school employees were negligent in their handling of the student's case. The court dismissed the complaint with leave to amend, reportedly suggesting that the amended complaint "allege specifically how the School Board is supposed to have violated its duties."[18]

In Pierce v. Board of Education of City of Chicago, 370 N.E.2d 535 (Ill. 1977), the Illinois Supreme Court decided an apparent educational malpractice case without specifically recognizing it as such. The complaint against the board of education alleged that from 1971 to 1974 the plaintiff student was suffering from a specific learning disability. In spite of the school board's knowledge of the disability, the student was not transferred from regular classes of instruction to special education classes. Further, it was alleged that the school board failed to undertake its own testing and evaluation of the student. As a result, the student allegedly suffered severe and permanent emotional injury requiring hospitalization and medical treatment. The complaint sought damages from the board to compensate for these injuries.

The trial court granted the board's motion to dismiss the complaint. The intermediate appellate court, however, found that the complaint stated a cause of action and reversed the trial court. On appeal to the Illinois

Supreme Court, the position of the trial court was sustained. In so holding the court found that the state constitution's pronouncement of the goal of "the educational development of all persons to the limits of their capacities" was a statement of general philosophy on education rather than a mandate that certain means be provided in any specific form. Further, the court found that the state statutes and regulations placed the ultimate responsibility for determining a pupil's eligibility for special education on the state board of education and not with the local board. Finally, the complaint did not allege the necessary compliance with state administrative procedures. For these reasons, the Illinois Supreme Court held that the complaint failed to state a cause of action against the local school board.

The next major education malpractice case arose in the State of New York. In Donohue v. Copiague Union Free School District, 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978), a case of first impression in New York, the intermediate appellate court faced the issue of whether to recognize a cause of action for educational malpractice. The plaintiff was a high school student attending a school operated by the defendant school district. The student had received failing grades in several subjects and lacked basic reading and writing skills, but was still permitted to graduate. Thereafter, the student found it necessary to seek tutoring in order to acquire the basic skills which he had not obtained in high school. The complaint sought to recover $5,000,000 in damages for the alleged deficiencies in his knowledge.

More specifically, the complaint alleged that the school district and its employees had breached their duty to the student in that they:

> gave to the plaintiff passing grades and/or minimal or failing grades in various subjects; failed to evaluate the plaintifff's mental ability and capacity to comprehend the subjects being taught to him at said school; failed to take proper means and precautions that they reasonably should have taken under the circumstances; failed to interview, discuss, evaluate and/or psychologically test the plaintiff in order to ascertain his ability to comprehend and understand such subject matter; failed to provide adequate school facilities, teachers, administrators, psychologists, and other personnel trained to take the necessary steps in testing and evaluation processes insofar as the plaintiff is conerned in order to ascertain the learning capacity, intelligence and intellectual absorption on the part of the plaintiff; failed to hire proper personnel, experienced in the

> handling of such matters; failed to teach the plaintiff in such a manner so that he could reasonably understand what was necessary under the circumstances so that he could cope with the various subjects which they tried to make the plaintiff understand; failed to properly supervise the plaintiff; failed to advise his parents of the difficulty and necessity to call in psychiatric help; that the processes practiced were defective and not commensurate with a student attending a high school within the County of Suffolk; failed to adopt the accepted professional standards and methods to evaluate and cope with plaintiff's problems which constituted educational malpractice.[19]

In its opinion, the intermediate appellate court stated that the question of whether, in any particular set of circumstances, one party owes a duty of care to another is entirely one of law to be determined by the courts.[20] The court further opined that the judicial recognition of the existence of a duty of care is dependent upon principles of sound public policy, including

> moral considerations arising from the view of society towards the relationship of the parties, the degree to which the courts should be involved in the regulation of that relationship and the social utility of the activity out of which the alleged injury arises; preventative considerations, which involve the ability of the defendant to adopt practical means of preventing injury, the possibility that reasonable men can agree as to the proper course to be followed to prevent injury, the degree of certainty that the alleged injuries were proximately caused by the defendant and the foreseeability of harm to the plaintiff; economic considerations which include the ability of the defendant to respond in damages; and administrative considerations, which concern the ability of the courts to cope with a flood of new litigation, the probability of feigned claims and the difficulties inherent in proving the plaintiff's case. . . .[21]

The majority of the intermediate appellate court set forth four reasons for dismissing the educational malpractice claim: (1) the courtroom is an improper forum in which to evaluate varied theories of

of learning; (2) the recognition of educational malpractice would lead to a flood of litigation; (3) the state constitutional provision requiring the establishment of free common schools and its enabling legislation confers the benefits of a free education upon the general public but does not create a duty to educate giving rise to a cause of action; and (4) even if there was a duty to educate the student, it would be extremely difficult to show the requisite causal relationship between the school's failure to educate and the student's illiteracy. Accordingly, the court held that the public policy of New York recognizes no cause of action for educational malpractice.

In contrast, the dissent relied on statutory language and the state education department's rules and regulations to find that the school district had a duty to educate the student. The dissent answered the concerns expressed in the majority opinion in the following manner:

> Initially, it must be emphasized that the policy considerations enunciated in Peter W. (60 Cal. App.3d 814, supra) do not mandate a dismissal of the complaint. Whether the failure of the plaintiff to achieve a basic level of literacy was caused by the negligence of the school system as the plaintiff alleges, or was the product of forces outside the teaching process, is really a question of proof to be resolved at a trial. The fear of a flood of litigation, perhaps much of it without merit, and the possible difficulty in framing an appropriate measure of damages, are similarly unpersuasive grounds for dismissing the instant cause of action. Fear of excessive litigation caused by the creation of a new zone of liability was effectively refuted by the abolition of sovereign immunity many years ago, and numerous environmental actions fill our courts where damages are difficult to assess. Under the circumstances, there is no reason to differentiate between educational malpractice on the one hand, and other forms of negligence and malpractice litigation which currently congest our courts.[22]

After reviewing the state education department's rules and regulations, the dissent concluded:

> In my view, the negligence alleged in the case at bar is not unlike that of a doctor who, although confronted with a patient with a cancerous condition, fails to pursue medically accepted procedures to (1) diagnose the specific condition and (2) treat the condition, and instead allows the patient to suffer

> the inevitable consequences of the disease. Such medical malpractice would never be tolerated. At the very least, a complaint alleging same would not be dismissed upon motion. In the case at bar, the plaintiff displayed, through his failing grades, a serious condition with respect to his ability to learn. Although mindful of this learning disability, the school authorities made no attempt, as they were required to do, by appropriate and educationally accepted testing procedures, to diagnose the nature and extent of his learning problem and thereafter to take or recommend remedial measures to deal with this problem. Instead, the plaintiff was just pushed through the educational system without any attempt made to help him. Under these circumstances, the cause of action at bar is no different from the analogous cause of action for medical malpractice and, like the latter, is sufficient to withstand a motion to dismiss.[23]

Following the decision by the court in the Appellate Division, the Donohue case was appealed to the New York Court of Appeals.[24] Judge Jasen, in writing the opinion for the court, stated that "[i]t may very well be that even within the strictures of a traditional negligence of malpractice action, a complaint sounding in 'educational malpractice' may be formally pleaded."[25] However, this conclusion in itself did not answer the question of whether a complaint seeking monetary damages for educational malpractice stated a cause of action cognizable in court. Judge Jasen further opined:

> The fact that a complaint alleging "educational malpractice" might on the pleadings state a cause of action within traditional notions of tort law does not, however, require that it be sustained. The heart of the matter is whether, assuming that such a cause may be stated, the courts should, as a matter of public policy, entertain such claims. We believe they should not.[26]

The court refused to recognize the malpractice claim on the principle that complaints of educational malpractice are for school administrative agencies, rather than the courts, to resolve. As stated by Judge Jasen:

> To entertain a cause of action for 'educational malpractice' would required the courts not merely to make judgments as to the validity of broad educational policies - a course we have unalteringly eschewed in the past - but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this

> cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies.[27]

In a special concurrence by Judge Wachtler, and joined in by Judge Gabrielli, it was concluded that the practical problems raised by an educational malpractice claim are so formidable that such a legal theory should not be cognizable. These practical problems were characterized as follows:

> the practical impossibility of proving that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student. Factors such as the student's attitude, motivation, temperament, past experience, and home environment may all play an essential and immeasurable role in learning. Indeed as the majority observes proximate cause might 'be difficult, if not impossible, to prove.'

The decision in Donohue to not recognize a cause of action for so-called educational malpractice did not deter another student in New York from attempting to recover on a similar theory. In Hoffman v. Board of Education,[28] very specific allegations of negligence were both alleged and proven to a jury. Evidence was offered that the student-plaintiff, who had a speech defect, was given an I.Q. test at age five. As a result of the test, which required an oral response, the plaintiff received an I.Q. score of 74. The evidence further showed that the cut-off point for placement in mentally retarded classes was a score of 75. In the previous year the student had been tested by an I.Q. test which required a functional response rather than an oral response and had attained a score of 90. It was acknowledged by the clinical psychologist performing the test on which the student scored 74 that the student's speech defect prevented an accurate assessment of the student's I.Q. The psychologist recommended that the student be given speech therapy and be retested in two years.

In spite of the psychologist's recommendation, however, the student was placed in classes for the mentally retarded where he remained without any retesting for 13 years until he was graduated at age 18. The student contended at trial that the failure to retest was a violation of good policy and practice. The local board argued that the student had received an adequate education in spite of the placement in the class for the mentally retarded. The case was tried before a jury and the student was awarded a verdict of $750,000.

An appeal of the jury award was taken to the Appellate Division.[29] The Appellate Division, two justices dissenting, affirmed the judgment as to

liability, predicating the affirmance upon the local board's failure to administer a second intelligence test to the student. The Appellate Division characterized the failure to retest as an affirmative act of negligence, actionable under New York law. In so holding, the court distinguished Donohue upon the ground that the negligence alleged in that case was a failure to educate properly (nonfeasance), whereas the present case involved an affirmative act of misfeasance. The court also held, however, that the award of $750,000 was excessive and would have reversed the judgment and required the plaintiff to retry the issue of damages had he not consented to a reduction in the amount of the verdict from $750,000 to $500,000.

The decision of the Appellate Divison was appealed to the New York Court of Appeals where the majority, in an opinion by Justice Jasen, reversed the Appellate Division.[30] The majority noted at the outset that the cause of action sounded in educational malpractice. After reviewing its holding in Donohue, the court stated the following:

> In order to affirm a finding of liability in these circumstances, this court would be required to allow the finder of fact to substitute its judgment for the professional judgment of the Board of Education as to the type of psychometric devices to be used and the frequency with which such tests are to be given. Such a decision would also allow a court or a jury to second guess the determinations of each of plaintiff's teachers. To do so would open the door to an examination of the propriety of each of the procedures used in the education of every student in our school system. Clearly, each and every time a student fails to progress academically, it can be argued that he or she would have done better and received a greater benefit if another educational approach or dianostic tool had been utilized. Similarly, whenever there was a failure to implement a recommendation made by any person in the school system with respect to the evaluation of a pupil or his or her educational program, it could be said, as here, that liability could be predicated on misfeasance. However, the court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of this state. In our view, any dispute concerning the proper placement of a child in a particular educational program can best be resolved by seeking review of such professional educational judgment through the administrative processes provided by statute.[31]

A dissent was filed by three judges in which it was stated that the case did not involve educational malpractice but rather "discernible affirmative negligence on the part of the Board of Education in failing to carry out the recommendation for re-evaluation within a period of two years which was an integral fact of the procedure by which plaintiff was placed in a CRMD class, and thus readily identifiable as the proximate cause of plaintiff's damages." Thus, on a 4-3 vote, the New York Court of Appeals decided to dismiss Hoffman's complaint.

A recent Connecticut case has raised the question of whether or not an implied private remedy for damages can be read into the provisions of the Education for All Handicapped Children Act of 1975 and its statutory predecessors.[32] In Loughran v. Flanders, 470 F. Supp. 110 (D. Conn. 1979), a 15-year-old learning disabled minor filed a complaint pursuant to the provisions of 20 U.S.C. § 1401 et seq. (Education for All Handicapped Children Act of 1975). The complaint sought a court order requiring the board members to implement an individualized course of instruction for the student[33] as well as $1,000,000 in damages for the alleged negligence of the board members in failing to implement an appropriate educational program earlier in the student's school career.

The federal district court noted that the standard for determining whether a private damage remedy is implicit in a statute not expressly providing for one was enunciated in the Supreme Court case of Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed.2d 26 (1975). Under the Cort standards, the district court found that the legislative histories of the special education statutes are devoid of even the slightest suggestion that Congress intended them to be a vehicle through which to initiate a private cause of action for damages. Furthermore, the court opined that the recognition of claims like the plaintiff's would cause special education programs to suffer, since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should the innovations fail. Finally, the court stated that the purported course of action is one traditionally relegated to state law. The court concluded that to recognize the plaintiff's alleged cause of action for monetary damages would be contrary to both the history and purpose of the Education for All Handicapped Children Act of 1975 and its statutory predecessors. Accordingly, the court granted the board's motion to dismiss the complaint.

The same result was reached by District Judge Nangle in a recent case from the Eastern District of Missouri. In Miener v. State of Missouri, No. 79-1050c(2) (E.D. Mo. January 25, 1980), the court agreed with the decision in Loughran that a private cause of action for damages should not be implied under the Education for All Handicapped Children Act of 1975.

Finally, a state circuit court in Maryland in 1979 refused to recognize educational malpractice as a cause of action in Maryland.[34] The court

cited both Peter W. and Donohue in holding that no duty to provide an adequate education existed toward the individual student. The court concluded that it would be a sad state of affairs if juries were able to decide whether or not the school system had functioned properly.

Thus, the scoreboard to date is totally one-sided in favor of the defendants in educational malpractice cases. From California, to Iowa, to Florida, to New York, to Maryland - all cases have eventually held that a claim for educational malpractice should not be recognized. But does this mean we have seen the last of the claims for educational malpractice or have we only seen the tip of the iceberg?

A LOOK TO THE 80'S

In spite of the lack of success by plaintiffs in educational malpractice cases, several factors lead to the conclusion that more and more claims for educational malpractice will be brought in the 1980's. And issues from the area of special education will likely lead the way.

First, courts to date have been reluctant to find a "duty of care" on the part of the local school districts that would satisfy this traditional requirement of a negligence action. However, in special education, P.L. 94-142 arguably contains that elusive duty of care which is missing in other non-special education cases. Historically, as statutes have become more prescriptive, the possibilities for courts adopting them as a statutory standard of care have increased, along with their applicability in negligence actions. In P.L. 94-142, Congress has enacted a statute which is prescriptive in nature. P.L. 94-142 may well become the new standard of care in the 1980's by which courts measure the actions or inactions of school districts in their evaluation and placement of special education students.

Second, courts have expressed in the past a reluctance to become involved in the actual daily operation of schools. Yet judicial review has already been afforded to some of the most significant aspects of educational policy:[35] school desegregation,[36] finance,[37] curriculum,[38] personnel practices,[39] and discipline.[40] In light of this judicial trend, courts will be susceptible to the argument that the recognition of a claim for educational malpractice is no more of an intrusion into the daily operation of school than the other now-accepted judicial actions.

Thirdly, courts have feared a flood of new litigation if they recognized the educational malpractice cause of action. However, such a concern can easily fade away if the right case is brought before a court. In other words, if a court is presented with a gross violation, its concern for the flood of new litigation will likely be forgotten.

Finally, courts have seemed reluctant to award damages in educational malpractice claims because of the novelty and the undeniable speculativeness and subjectivity of such damage claims. Plaintiffs have helped create this reluctance by making claims for astronomical amounts of money in such suits. These high damage claims tend to confirm the courts' feelings that educational harms are incapable of practical monetary evaluation and divert their attention from the more concrete approaches to assessing damages. If plaintiffs shift their approach in the future to an emphasis on smaller amounts of damages and orders of affirmative relief, their chances of succeeding on claims for educational malpractice will increase.

On the other side of the coin, school districts must continue to emphasize those arguments which have been so persuasive to date. First and foremost, districts must urge that the courtroom is an improper forum in which to evaluate broad educational policies, as well as their day-to-day implementation. The responsibility for the administration of our public school system belongs to the school administrative agencies, not the courts. Second, the flood-gate argument must still be made. As court dockets across the country continue to be a headache, most courts will be sensitive to their inability to cope with a flood of new litigation. Third, the difficulties in showing the requisite causal relationship between the failure of the defendant to conform to the standard of conduct and the harm suffered by the plaintiff must continue to be stressed. Although this can be considered a question of proof to be resolved at trial, it can also be viewed as a legitimate public policy reason for the non-recognition of such a claim. Finally, districts must cite to the courts the growing body of case law which has already refused to recognize the claim for educational malpractice. Judges, like most of us, take comfort in the fact that a claim for educational malpractice should not be recognized, the more difficult the plaintiffs' task becomes.

In the end, the most important factor of all affecting future claims of educational malpractice may be the extent to which school districts, their personnel, and their legal counsel keep abreast of the ever-changing requirements in special education. Truly an ounce of prevention will be worth a pound of cure.

FOOTNOTES

1 Comment: Educational Malpractice, 124 U.Pa.L.Rev. 756 (1976).

2 W. Prosser, Handbook of the Law of Torts § 30 at 143-144 (4th ed. 1971).

3 Restatement (Second) of Torts § 328A (1965).

4 20 U.S.C. § § 1400-1461 (1976).

5 See S. Rep. No. 168, 94th Cong., 1st Sess. 18, reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1442.

6 See 20 U.S.C. § 1412(4) (1976).

7 See 20 U.S.C. § 1414(a) (5) (1976).

8 See 20 U.S.C. § 1413(a) (1976).

9 Iowa Admin. Code § § 670-12.1 to .42 (1975).

10 See Kirp, Buss & Kuriloff, Legal Reform of Special Education: Empiricle Studies and Procedural Proposals, 62 Calif. L.Rev. 40, 50-52 (1974).

11 Id. at 50

12 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

13 First Amended Complaint at 6-8, Doe v. San Francisco Unified School Dist., No. 653-312 Super. Ct. (Cal. 1974).

14 Peter W. v. San Francisco Unified School District, supra, 60 Cal.App.3d at 827, 131 Cal. Rptr. at 862.

15 Id. at 824, 131 Cal. Rptr. at 860-61.

16 The court disposed of the claim of misrepresentation, noting that the essential element of detrimental reliance upon the alleged misrepresentation was not alleged in the complaint.

17 Beaman v. Des Moines Area Community College, Law No. CL15-8532 (Iowa 1978).

18 Fort Lauderdale News, 8/4/77.

19 Donohue v. Copiague Union Free School District, 64 A.D.2d 29, 31-32 (N.Y. 1978).

20 Id. at 33.

21 Id.

22 Id. at 41-42.

23 Id. at 44.

24 391 N.E.2d 1352, 47 N.Y.2d 440 (1979).

25 Donohue v. Copiague Union Free School District, 391 N.E.2d 1352, 1353 (N.Y. 1979).

26 Id. at 1354.

27 Id.

28 No. 71-12593 Sup. Ct. (N.Y. 1976).

29 64 A.D.2d 369, 410 N.Y.2d 99 (1978).

30 Hoffman v. The Board of Education of the City of New York, No. 562, Ct. App. (N.Y. 1979).

31 Id.

32 The same issue has been raised under Section 504 of the 1973 Rehabilitation Act with a resulting split of authorities. For example, in Miener v. State of Missouri, No. 79-1050c(2) (E.D. Mo. January 25, 1980), District Judge Nangle held that a private cause of action for damages should not be implied under Section 504. In contrast, in Patton v. Dumpson, 75 Civ. 4922 (S.D. N.Y. January 23, 1980), District Judge Owen held that a private cause of action for damages should be implied under Section 504.

33 After the complaint was filed, the parties agreed upon an educational program, thus mooting that portion of the complaint seeking affirmative equitable relief.

34 Doe v. Board of Education of Montgomery County, Cir. Ct. (Md. 1979).

35 See Wilkinson, Goss v. Lopez: The Supreme Court as School Superintendent, 1975 Sup. Ct. Rev. 25.

36 See, e.g., Milliken v. Bradley, 418 U.S. 717 (1974).

37 See, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

38 See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968).

39 See, e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

40 See, e.g., Wood v. Strickland, 420 U.S. 308 (1975).